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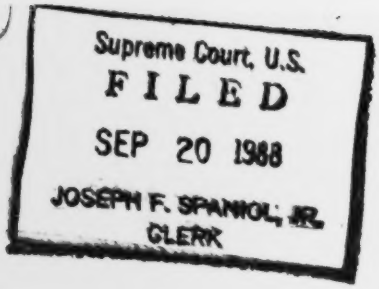

NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

IN THE MATTER OF:

JACK A. NORTHROP,

Petitioner

vs.

LEASE FINANCING CORPORATION,
FRANK P. SLATTERY, JR., and
RICHARD E. CARUSO,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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On the Petition

QUESTIONS PRESENTED

1. Whether, in light of the fact that the controlling authority of this Court and of every court of appeals requires borrowing a statute of limitations from state law to govern a federal cause of action where Congress has provided no limitations period for the federal claim, the court of appeals erred in applying a federal rather than a state statute of limitations to all claims arising under Sec. 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5.

2. Whether the court of appeals misread and/or misapplied the applicable decisions of this Court in deciding to apply a single, uniform statute of limitations to all claims arising under Sec. 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5.

3. Whether, in view of the controlling decisions of this Court dating back more than a century which require tolling of the applicable statute of limitations in cases alleging fraud, the court of appeals erred in applying a statute of limitations to all claims arising under Sec. 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 which does not permit tolling in cases where the facts constituting the fraud are neither discovered nor discoverable until more than three years after the fraud has occurred.

4. Whether the court of appeals erred and failed to apply the sound precedents of this Court and the other courts of appeals, in refusing to consider or decide the issue of whether its decision to apply a new, shorter statute of limitations to all claims arising under Sec. 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 should apply prospectively only and not retroactively to petitioner's claims, and in remanding to the district court to decide that issue in the first instance.

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Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Jack A. Northrop, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on June 24, 1988.

OPINIONS BELOW

The opinion of the court of appeals (App. A, infra, at 1a-6a) is unreported.

The opinion of the district court (App. B, infra, at 7a-59a) is unreported.

The opinion of the court of appeals in In re Data Access Systems Securities Litigation, upon which the court of appeals relied, is reported at 843 F.2d 1537 (3d Cir. 1988). Plaintiffs in In re Data Access have filed a petition for a writ of certiorari under No. 88-54 which is pending. Petitioner respectfully requests that this petition be considered with the one pending in In re Data Access.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 1988. The order of the court of appeals staying its mandate until September 22, 1988 (App. C, infra, at 60a) was entered on August 22, 1988. The jurisdiction of this Court is invoked under 28 U.S.C Sec. 1254(1).

STATUTES AND RULES INVOLVED

Sections 9(e), 10(b), 18(c) and 29(b) of the Securities Exchange Act, 15 U.S.C. Secs. 78i(e), 78j(b), 78r(c) and 78cc(b), are set forth in Appendix D hereto, infra at 61a-65a. Rule 10b-5 promulgated by the Securities and Exchange Commission, 17 C.F.R. Sec. 240.10b-5, is set forth in Appendix D at 61a-62a.

STATEMENT OF THE CASE

A. Background

Petitioner, Jack A. Northrop, ("Northrop"), a former employee of Lease Financing Corporation ("LFC"), commenced this action in the District Court for the Eastern District of Pennsylvania on April 24, 1987, by filing a complaint against LFC and two of its officers, Frank P. Slattery, Jr. ("Slattery") and Richard E. Caruso ("Caruso"). In the complaint, Northrop alleged that defendants were liable to him under the Securities Exchange Act of 1934, 15 U.S.C. Sec. 78 et seq., and specifically, Sec. 10(b) thereof and Rule 10b-5 promulgated thereunder. In addition, Northrop alleged violations of the Age Discrimination in Employment Act of 1967,

29 U.S.C. Sec. 621 et seq. Additionally, Northrop asserted pendent state law claims against the defendants for breach of employment contract and breach of fiduciary duty. The district court had subject matter jurisdiction over the federal claims under 29 U.S.C. Sec. 626(c)(1), 15 U.S.C. Sec. 78aa and 28 U.S.C. Sec. 1331.

Northrop's Securities Exchange Act ("Sec. 10(b) and Rule 10b-5") claims were asserted in the third counts of his original complaint and an amended complaint he filed in July of 1987. Only those claims are material to this petition. Northrop alleged that in December of 1984, the defendants, through various affirmative misrepresentations and deliberate omissions to state material facts, fraudulently induced him

to sell all of the stock he owned in LFC to a company known as Superior Tube Company ("Superior").

The complaint alleged that, as of November 1984, Northrop, along with the individual defendants, all owned shares of LFC stock and held a right to sell all of their stock to Superior pursuant to the terms and provisions of a certain "Stock Purchase Agreement." The complaint alleged also that Slattery and Caruso, who were officers of LFC and insiders, advised Northrop near the end of 1984 that they intended to exercise their rights to sell before the end of the year if Northrop would agree to sell with them. Northrop alleged that he agreed to and did part with all of his LFC stock in December of 1984, as a result of statements Slattery and Caruso

had made to him to the effect that it would be monetarily advantageous for all three to sell together at that time because the price of the stock was going to decline. However, Northrop alleged, Slattery and Caruso had actually decided between themselves before the end of 1984 not to sell their stock because, based on their inside information to which Northrop was not privy, they knew it would not be financially advantageous for them (or for Northrop) to do so. It was alleged further that the defendants, having inside information, knew the value of the stock would actually increase after 1984, but that they deliberately withheld this information from Northrop in order to carry out their fraudulent scheme and induce Northrop to sell.

Northrop alleged that the defendants fraudulently concealed from him their decision not to sell their stock, and fraudulently misrepresented to him that they would sell if he would. It was alleged also that these fraudulent misrepresentations and omissions were made by the defendants for the purpose of inducing Northrop to sell his LFC stock so that defendants could fire him as an employee and consequently obtain for themselves a greater interest in and greater control of LFC, as well as a larger share of the profits. It was also alleged that Northrop relied on defendants' statements and actions because of their status as officers and insiders.

The complaint went on to allege that, by letter to Superior dated

December 31, 1984, Slattery consummated the sale of Northrop's stock, (which Slattery had held in a trust capacity). The letter confirmed that Slattery and Caruso had decided not to participate in the transaction, and that only Northrop had sold his stock. Northrop alleged that Slattery's letter confirming the sale, (which was sent to Superior only), was fraudulently concealed from him by the defendants until February of 1986, when he obtained a copy of the letter during settlement negotiations relating to his other claims, and learned for the first time that he had been defrauded. According to the complaint, prior to February of 1986, Northrop had believed and relied upon Slattery's and Caruso's misrepresentations that they had sold all of their LFC stock at the end of 1984, as

he had. The complaint alleged that, as a result of the defendants' fraud which induced Northrop to sell all of his stock in December of 1984, Northrop suffered a monetary loss which exceeded $800,000.00.

The defendants were neither the buyers nor the sellers of Northrop's LFC stock. Northrop did not contend that the actual purchaser of the stock, Superior, was a participant in the alleged fraud nor did he name Superior as a defendant. Accordingly, there was no privity between Northrop and the defendants with regard to the sale/purchase of Northrop's LFC stock.

B. Proceedings Below

1. The Decision of the District Court

Pursuant to Fed.R.Civ.P. 12(b)(6), defendants moved to dismiss the claims

asserted under the Securities Exchange Act in the original complaint, contending that those claims were time-barred and that in any event, Northrop had failed to state a claim under the Securities Exchange Act upon which relief could be granted. In response to the motion to dismiss, Northrop filed an amended complaint, in which he alleged with greater specificity than had been alleged previously, the facts which gave rise to his Securities Exchange Act claims, and which supported his contention that those claims had been brought in a timely manner.

The defendants then moved to dismiss the Securities Exchange Act claims asserted in the amended complaint, contending once again that those claims were barred by the statute of

limitations, and that in any event, Northrop had still failed to state a claim upon which relief could be granted. Northrop filed memoranda in opposition to the motions to dismiss.

In an unpublished opinion issued on December 18, 1987, (App. B, infra, at 7a-59a), the district court (McGlynn, J.) denied the motion to dismiss Northrop's Securities Exchange Act claims. The district court concluded that Northrop had stated a claim against the defendants under Sec. 10(b) and Rule 10b-5 upon which relief could be granted. (Id. at 34a-49a). This aspect of the district court's ruling was not the subject of defendants' appeal.

The district court ruled further that Northrop's Sec. 10(b) and Rule 10b-5 claims had been brought in a timely

manner, and were not barred by the statute of limitations. (Id. at 16a-33a). The district court's reasoning was as follows.

Northrop commenced his action on April 24, 1987, alleging that he had neither discovered nor reasonably could have discovered that he had been defrauded by defendants until February of 1986. The defendants argued that the Securities Exchange Act claims were time-barred because they were subject to the one-year statute of limitations found in Pennsylvania's "Blue Sky" law. Northrop, on the other hand, argued that his Sec. 10(b) and Rule 10b-5 claims were governed by Pennsylvania's two-year statute of limitations for common law fraud claims. See, 42 Pa.Cons.Stat.Ann. Sec. 5524(7)(Purdon Supp. 1987). The district

court ruled that the action was timely filed because, as Northrop had argued, Pennsylvania's two-year statute of limitations for common law fraud claims was applicable to his Securities Exchange Act claims. (Id. at 16a-24a). The district court determined that since the complaint alleged that Northrop neither discovered nor could have reasonably discovered that he had been defrauded until February of 1986, and the two-year statute was subject to being tolled, the Sec. 10(b) and Rule 10b-5 claims were timely asserted because the action had been filed within two years of February 1986. (Id. at 25a-33a). The district court's ruling on the issue of when the statute of limitations governing Northrop's Sec. 10(b) and Rule 10b-5

claims began to run, was not the subject of defendants' appeal either.

In ruling in favor of Northrop on the statute of limitations issue, the district court relied on the Third Circuit's decision in Biggans v. Bache Halsey Stuart Shields, 638 F.2d 605 (3d Cir. 1980). (Id. at 16a-24a). In Biggans, the Third Circuit recognized that Pennsylvania's two-year statute of limitations for common law fraud claims was applicable to all Sec. 10(b) and Rule 10b-5 claims arising in Pennsylvania where there is an absence of privity between the parties. 638 F.2d at 610. Conversely, the Third Circuit in Biggans ruled, the one-year statute found in the Pennsylvania Blue Sky law would apply when there is privity between the parties. Ibid. Here, it is undisputed

that there was no privity between Northrop and the defendants; defendants were neither the buyers nor the sellers of the stock which was the subject of Northrop's Securities Exchange Act claims. (App. B, infra, at 17a-19a). Accordingly, the district court concluded, it was "bound by the rule set forth in Biggans" and "Northrop's Sec. 10(b) claim is governed by Pennsylvania's two-year statute of limitations for common law fraud." (Id. at 22a-23a). The district court therefore denied the motion to dismiss because, pursuant to tolling principles, Northrop had commenced his action less than two years after he had discovered he had been defrauded.

2. The Decision of the Court of Appeals

In denying the motion to dismiss, however, the district court certified for interlocutory appeal pursuant to 28 U.S.C. Sec. 1292(b) the following question:

> What is the appropriate period of limitations in Pennsylvania for claims under Sec. 10(b) of the Securities and Exchange Act of 1934 in light of the United States Supreme Court's decision in Wilson v. Garcia, 471 U.S. 261 (1985) and its progeny in the Third Circuit. (App. B, infra, at 58a).

The Third Circuit granted defendants' petition for leave to appeal on January 20, 1988. Defendants appealed solely from that portion of the district court's order denying the motion to dismiss the claims asserted under the Securities Exchange Act as time-barred.

In its opinion, entered on June 24, 1988, the Third Circuit relied on its recent ruling in In re Data Access Systems Securities Litigation, 843 F.2d 1537 (3d Cir. 1988)(en banc), and concluded, as in In re Data Access, that the appropriate limitations period to be applied to Sec. 10(b) and Rule 10b-5 claims arising in Pennsylvania is the "one year/three year" statute of limitations found in Secs. 9(e), 18(c) and 29(b) of the Securities Exchange Act, 15 U.S.C. Secs. 78i(e), 78r(c) and 78cc(b). 843 F.2d at 1545-50. The new limitations period adopted by the Third Circuit in In re Data Access, and reaffirmed in this case, requires that all federal securities fraud claims be brought within one year after discovery of the fraud, but in no event more than

three years after the fraud occurred. Ibid.[1]

Under the Third Circuit's decisions in In re Data Access and this case, the three-year period of limitations to be applied to claims arising under the Securities Exchange Act cannot be extended, even in cases where the fraud is undiscovered or undetectable (due to a defendant's concealment) until after the three year period has elapsed. [In this case, Northrop commenced his action more than one year, and less than two years after he discovered he had been

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[1] The plaintiffs in In re Data Access have filed a petition for a writ of certiorari with this Court under No. 88-54 which is pending. Northrop respectfully requests that his petition be considered with the petition filed in In re Data Access.

defrauded, but less than three years after the fraud had occurred].

In its opinion in this case, the Third Circuit stated that, "[o]ur decision in In re Data Access, therefore, has provided the answer to the question certified in this appeal." (App. A, infra, at 4a). Accordingly, the Third Circuit ruled, the "appropriate" period of limitations in Pennsylvania for claims arising under Sec. 10(b) of the Securities Exchange Act is now the one year/three year limitations period discussed above. Ibid. Because Northrop discovered he had been defrauded in February of 1986, under the new rule announced by the Third Circuit, he would have had to have started suit by February of 1987.

The Third Circuit overturned its own precedents, including Biggans, supra, in ruling as it did in In re Data Access and in this case. First, it decided to apply a single, uniform statute of limitations to all Sec. 10(b) and Rule 10b-5 claims. It also adopted a limitations period for claims arising under Sec. 10(b) and Rule 10b-5 never before applied in federal jurisprudence. Under the Third Circuit's decisions, the three-year limitations period cannot be tolled, even in cases where a defendant's fraudulent conduct is self-concealing and therefore remains undetected until the three-year period has elapsed. Moreover, the Third Circuit ruled as it did in In re Data Access and this case, "borrowing" a federal statute of limitations to apply to claims brought under the Securities

Exchange Act, despite its acknowledgement that under the controlling precedents of this Court, it "must borrow a state statute." 843 F.2d at 1545. (Emphasis added). See, e.g., Wilson v. Garcia, 471 U.S. 261, 266 (1985). ("When Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law"). In In re Data Access, which formed the basis for the Third Circuit's decision in this case, the Third Circuit decided to apply a limitations period found in a federal statute to all Sec. 10(b) and Rule 10b-5 claims because, it its view, "state statutes of limitations are an unsatisfactory vehicle for the enforcement of" Sec. 10(b) and Rule 10b-5. 843 F.2d at 1545.

In his brief filed with the Third Circuit, Northrop argued that in the event the Third Circuit decided to apply a one-year statute of limitations rather than the two-year statute of limitations adopted in Biggans and its progeny to all claims brought in Pennsylvania under Sec. 10(b) and Rule 10b-5, its decision should have prospective effect only and should not apply retroactively to his claims. Northrop argued that if the Third Circuit's ruling was prospective only, his claims under the Securities Exchange Act would not be time-barred regardless of which statute of limitations the Third Circuit decided to apply, because he had reasonably and justifiably relied upon the Third Circuit's rulings in Biggans and its progeny in filing his action more than one year, but less than two years,

after his Securities Exchange Act claims had arisen. [Even the district court ruled that it was bound by Biggans when it denied the defendants' motion to dismiss].

Again relying on In re Data Access, the Third Circuit chose not to decide the issue of whether its ruling should "have prospective effect only and not apply to the present case." (App. A, infra, at 4a-5a). Rather, as in In re Data Access, supra, the Third Circuit remanded the prospectivity/retroactivity question to the district court and directed the district court to decide that issue in the first instance. The Third Circuit reasoned that because "the district court's certification order did not pose the prospectivity question", and "the [prospectivity] issue is not

addressed by the district court and was not raised by the parties", "we will remand to the district court for proceedings consistent with this opinion." (Id. at 5a).

The district court has not decided the prospectivity/retroactivity issue in this case because the Third Circuit stayed its mandate pending the filing of this petition. (App. C, infra, at 60a).

Three judges dissented in In re Data Access Systems on the grounds that, "the majority commits egregious error in not addressing and resolving plaintiffs' argument that if a new limitations rule is adopted, it should not be applied to this case." 843 F.2d at 1551. The dissent argued that because the Third Circuit was obligated to rule on the propriety of district court's order

denying the defendants' motion to dismiss, it was also obliged to rule on the prospectivity/retroactivity issue because a determination of the correctness of the district court's order necessarily included consideration of that issue. Id., at 1551-52. As the dissent noted in In re Data Access, "it is commonplace for courts formulating a new or different rule of law to rule on its retroactivity at the same time." Id., at 1552.

Nevertheless, the Third Circuit in Northrop's case, relying upon the majority opinion in In re Data Access, failed to decide the prospectivity/ retroactivity issue and remanded to the district court for a determination hereof.

REASONS FOR GRANTING THE WRIT

A. The Third Circuit's Ruling, Which Requires the Application of a Federal Rather Than a State Limitations Period to Claims Brought Under Sec. 10(b) and Rule 10b-5, Conflicts with the Decisions of This Court and the Other Courts of Appeals

In In re Data Access and in this case, the Third Circuit refused to apply a state statute of limitations to claims brought pursuant to Sec. 10(b) and Rule 10b-5. Instead, the Third Circuit decided to apply the federal, "one year/three year" statute of limitations. This holding conflicts with explicit rulings of this Court and creates clear, irreconcilable conflicts among the circuits. In fact, prior to the Third Circuit's decisions in In re Data Access and this case, every court of appeals, including the Third Circuit itself, had

ruled that it was bound to apply the most analogous state limitations period to claims arising under Sec. 10(b) and Rule 10b-5.

In In re Data Access, the Third Circuit acknowledged that under the controlling precedents of this Court, it "must borrow a state statute" of limitations to apply to the private right of action under Sec. 10(b). 843 F.2d at 1545. However, the Third Circuit in In re Data Access decided not to apply state common law or state statutory law, and concluded that "it would seem bizarre if not anomalous to go beyond the express statutes of limitations" found elsewhere in the federal securities laws. 843 F.2d at 1549. The Third Circuit reasoned that to promote uniformity and to eliminate what it perceived to be the uncertainty

and guesswork created by the use of state limitations periods, it would "borrow" a single, "one year/three year" limitations period for all claims arising under Sec. 10(b) and Rule 10b-5. This limitations period was borrowed from federal law, and in particular, from Secs. 9(e), 18(c) and 29(b) of the Securities Exchange Act. The Third Circuit concluded in In re Data Access, at 843 F.2d 1550:

> Accordingly, we have decided that the proper period of limitations for a complaint charging violation of section 10(b) and Rule 10b-5 is one year after the plaintiff discovers the facts constituting the violation, and in no event more than three years after such violation.

However, by its decision to apply uniformly a federal rather than a state statute of limitations to all federal securities law claims, the Third Circuit not only overruled its own precedents, as

announced in Biggans and its progeny, but it reached a result which is in direct conflict with the controlling authority of this Court. In Ernst & Ernst v. Hochfelder, 425 U.S. 185, 210 & n.29 (1976), this Court ruled, in the context of a federal securities law claim:

> Since no statute of limitations is provided for civil actions under Sec. 10(b), the law of limitations of the forum State is followed as in other cases of judicially implied remedies.

The Third Circuit in In re Data Access therefore erred in finding that "the Supreme Court has yet to rule on the applicable limitations period for a section 10(b) and Rule 10b-5 action." 843 F.2d at 1539. Moreover, as the Seventh Circuit noted in Norris v. Wirtz, 818 F.2d 1329, 1332 (7th Cir. 1987), even if there were a need to impose a single, federal statute of limitations to govern

all Sec. 10(b) and Rule 10b-5 claims, only this Court or Congress could impose such a rule.

In concluding that it was necessary to apply a uniform federal statute of limitations to all Sec. 10(b) and Rule 10b-5 claims, the Third Circuit in In re Data Access misread and misapplied the decisions of this Court upon which it relied. See, Wilson v. Garcia, 471 U.S. 261 (1985)(42 U.S.C. Sec. 1983 civil rights action); Del Costello v. Internat'l Brotherhood of Teamsters, 462 U.S. 151 (1983)(fair representation claim under Sec. 301 of Labor Management Relations Act); Agency Holding Corp. v. Malley-Duff & Associates, ____U.S.____, 107 S.Ct. 2759 (1987)(RICO). The Third Circuit's conclusion in In re Data Access that the

Supreme Court in these decisions sent "a strong signal" to the lower courts to adopt a single federal statute of limitations for all claims arising under Sec. 10(b) and Rule 10b-5, evinces a misreading and misunderstanding by the Third Circuit of the rationale and thrust of these decisions. In fact, the Third Circuit's ruling in In re Data Access, reaffirmed in this case, finds no support in Wilson, Del Costello or Malley-Duff.

In Wilson, this Court ruled that, "[w]hen Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so." (Emphasis added). 471 U.S. at 266-67. Moreover, in Wilson, this Court actually

rejected the notion of applying a single, uniform national statute of limitations to all claims arising under 42 U.S.C. Sec. 1983. Instead, the Court directed the lower courts to apply the various personal injury statutes of limitations of the states in which they sit. [The length of the states' statutes of limitations governing personal injury claims vary].

In Del Costello, this Court decided to apply a uniform federal statute only because it determined that the application of a 90-day state limitations period would "frustrate or interfere with the implementation of national [labor] policies." 462 U.S. at 161. The Court in Del Costello decided not to apply the limitations period provided by state law only because it was

too short. Id., 462 U.S. at 166-67. Thus, the Court adopted a longer federal limitations period in order to avoid the "too-short time in which an employee could sue his employer under borrowed state law." Id., 462 U.S. at 167. However, in so holding, this Court was careful to point out that a state statute of limitations should be borrowed unless the state statute is "at odds with the purpose or operation of federal substantive law." Id., 462 U.S. at 161.

In Malley-Duff, the Court recognized that RICO claims are sui generis, and adopted the Clayton Act's four-year limitations period for all civil RICO claims simply to avoid the uncertainty and confusion of choosing the "most analogous" state limitations periods from the numerous arguable state

law alternatives. 97 L.Ed.2d at 128-31. However, this Court in Malley-Duff was careful to note that: "Given our longstanding practice of borrowing state law, and the congressional awareness of this practice, we can generally assume that Congress intends by its silence that we borrow state law." 97 L.Ed.2d at 128.

Moreover, this Court in Hochfelder, supra, has already instructed the lower courts to apply the most analogous state statutes of limitations to claims arising under Sec. 10(b) and Rule 10b-5.

The decisions of the Third Circuit in In re Data Access and in this case have also created a clear conflict among the circuits on the issue of whether to apply a state or a federal statute of limitations to claims arising under Sec.

10(b) and Rule 10b-5. Until the Third Circuit's decisions, all of the courts of appeals, following Hochfelder, had applied "the law of limitations of the forum state" to federal securities law claims. See, e.g., Cook v. Avien, Inc., 573 F.2d 685, 691 (1st Cir. 1978)(state statute of limitations for personal injury tort suits); Armstrong v. McAlpin, 699 F.2d 79, 86-87 (2d Cir. 1983)(state common law fraud statute of limitations); O'Hara v. Kovens, 625 F.2d 15, 17 (4th Cir. 1980) (state Blue Sky statute of limitations); Breen v. Centex Corp., 695 F.2d 907, 910-11 (5th Cir. 1983)(state common law fraud statute of limitations); Marx v. Centran Corp., 747 F.2d 1536, 1551 (6th Cir. 1984)(state "catch-all" statute of limitations); Andrews v. Heinold Commodities, Inc., 771 F.2d 184,

186 (7th Cir. 1985)(state Blue Sky statute of limitations); Morris v. Stifel, Nicolaus & Co., Inc., 600 F.2d 139, 146 (8th Cir. 1979)(state Blue Sky statute of limitations); Vucinich v. Paine, Webber, Jackson & Curtis, Inc., 739 F.2d 1434, 1436 (9th Cir. 1984)(state common law fraud statute of limitations); Loveridge v. Dreagoux, 678 F.2d 870, 874 (10th Cir. 1983)(state common law fraud statute of limitations); Friedlander v. Troutman, Sanders, Lockerman & Ashmore, 788 F.2d 1500, 1509 (11th Cir. 1986)(state Blue Sky statute of limitations); Forrestal Village, Inc. v. Graham, 551 F.2d 411, 413 (D.C. Cir. 1977)(state Blue Sky limitations period). Indeed, the Third Circuit itself in Biggans and in Roberts v. Magnetic Metals Co., 611 F.2d 450 (3d Cir. 1979), had

ruled that state limitations periods were to be applied to claims arising under Sec. 10(b) and Rule 10b-5. That is why the district court here applied Pennsylvania's two-year statute for common law fraud to Northrop's claims.

The Third Circuit's decision to apply a federal rather than a state statute of limitations has therefore created a strong conflict among the circuits on this issue. Moreover, the Third Circuit's decisions have potentially far-reaching implications; it ruled that the single, federal limitations period it selected should be applied to all federal securities law claims arising throughout the country. In re Data Access, supra, 843 F.2d at 1545-50. Accordingly, review of the Third Circuit's ruling is necessary.

B. The Third Circuit's Decision to Apply a Single, Uniform Limitations Period to All Claims Arising Under Sec. 10(b) and Rule 10b-5 Conflicts With and Misapplies the Controlling Precedent of the Supreme Court

In In re Data Access and in this case, the Third Circuit decided to apply to so-called "uniform characterization" approach to selecting the most analogous statute of limitations to claims arising under Sec. 10(b) and Rule 10b-5. In adopting this approach, the Third Circuit ruled that, henceforth, all claims arising under Sec. 10(b) and Rule 10b-5 are to be treated in the same way for statute of limitations purposes, and are to be governed uniformly by one statute of limitations -- the "one year/three year" federal statute discussed above.

In applying the "uniform characterization" approach to federal

securities law claims, the Third Circuit relied on this Court's decisions in Wilson and Malley-Duff. However, in holding as it did, the Third Circuit misapplied and misread Wilson and Malley-Duff because it is clear that the Court in those cases did not send "a strong signal" to the lower courts to extend the "uniform characterization" approach to claims arising under Sec. 10(b) and Rule 10b-5. In fact, a careful reading of Wilson and Malley-Duff shows that the Third Circuit's prior decisions in Biggans and Roberts, upon which the district court relied in denying the defendants' motion to dismiss, were correct and should have retained their vitality in the aftermath of Wilson and Malley-Duff.

In Wilson, in holding that all claims brought under 42 U.S.C. Sec. 1983 should be characterized as personal injury tort claims for statute of limitations purposes, the Court was careful to point out that parallel actions to 42 U.S.C. Sec. 1983 are not available under state law. This is precisely why this Court adopted the "uniform characterization" approach for Sec. 1983 claims. The Court in Wilson noted that "Sec. 1983 provides a uniquely federal remedy" that "override[s] certain kinds of state laws", is "supplementary to any remedy any State might have", and therefore, "can have no precise counterpart in state law." 471 U.S. at 272. This Court concluded in Wilson that, for these reasons, "[a]lmost every Sec. 1983 claim can be favorably

analogized to more than one of the ancient common-law forms of action, each of which may be governed by a different statute of limitations." Id., 471 U.S. at 272-73. This Court ruled, therefore, that because Sec. 1983 encompasses "numerous diverse topics and subtopics", and because literally scores of different types of claims are actionable under Sec. 1983, "counsel could almost always argue, with considerable force, that two or more periods of limitations should apply to each Sec. 1983 claim." Id., 471 U.S. at 273-74. This Court reasoned that, due to the unique and diverse nature of Sec. 1983, and the guesswork and uncertainty involved in selecting statutes of limitations for Sec. 1983 claims, "the adoption of one analogy rather than another will often be somewhat

arbitrary", and therefore, "the federal interests in uniformity, certainty and minimization of unnecessary litigation all support the conclusion that Congress favored [the] simple approach" of characterizing all Sec. 1983 claims uniformly, albeit arbitrarily, as personal injury tort claims. Id., 471 U.S. at 272-76.[2]

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[2] Significantly, this Court in Wilson ruled that, in determining what the most analogous state limitations period is, the court should initially determine whether all claims arising under the federal statute in question "should be characterized in the same way, or whether they should be evaluated differently depending upon the varying factual circumstances and legal theories presented in each individual case." 471 U.S. at 268. Accordingly, contrary to what the Third Circuit has ruled, this Court in Wilson did not send a signal to the lower courts that they should apply the "uniform characterization" approach to all federal claims which require a "borrowing" analysis. Rather, the Court in Wilson determined, for the reasons stated above, and because of the peculiar and unique nature of Sec. 1983, the
(footnote continued on following page)

In Malley-Duff, supra, this Court, relying upon Wilson, decided to apply the "uniform characterization" approach to RICO claims. Citing to Wilson, the Court in Malley-Duff concluded that: (1) civil RICO claims have no counterpart in state law; (2) RICO "is similar to Sec. 1983 in that both 'encompass numerous diverse topics and subtopics'"; and (3) therefore, the "uniform characterization" approach is also applicable to RICO claims. 47 L.Ed.2d at 128-30. Significantly, the Court in Malley-Duff decided to apply a uniform statute of limitations to all RICO claims, only

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"uniform characterization" approach was particularly applicable to Sec. 1983 claims. The holding in Wilson was peculiar to claims arising under Sec. 1983 and was not nearly as all-encompassing as the Third Circuit believes it was.

because of "the lack of any satisfactory state law analogue to RICO" and because claims arising under RICO "cannot be reduced to a single generic characterization." 97 L.Ed.2d at 131. This Court in Malley-Duff adopted the court of appeals' reasoning that, "[e]ven RICO claims based on 'garden variety' business disputes might be analogized to breach of contract, fraud, conversion, tortious interference with business relations, misappropriation of trade secrets, unfair competition, usury, disparagement, etc., with a multiplicity of applicable limitations periods." 97 L.Ed.2d at 129. Once again, it is clear that this Court in Malley-Duff did not intend to send a signal to the lower courts to apply the "uniform characterization" approach to claims

arising under Sec. 10(b) and Rule 10b-5. The holding in Malley-Duff was peculiar to RICO calims.

The Third Circuit's decisions in In re Data Access and this case are in conflict with this Court's decisions in Wilson and Malley-Duff because there are almost exact generic counterparts to Sec. 10(b) and Rule 10b-5 existing under Pennsylvania state law -- common law fraud and the blue sky laws -- one of which can easily be applied to any federal securities law claim, depending upon a relatively simple set of facts, i.e., whether the parties were in privity. The considerations which led this Court in Wilson and Malley-Duff to apply the "uniform characterization" approach in those cases are simply not present in the federal securities law

arena. Unlike Sec. 1983 and RICO, Sec. 10(b) and Rule 10b-5 are not sui generis. Whereas practically any claim arising under Sec. 1983 or RICO can be favorably analogized to a multiplicity of state law claims, ranging from tort to contract to unfair competition, claims arising under Sec. 10(b) and Rule 10b-5 cannot be; they are all akin to claims based on one type of misconduct -- fraud. Accordingly, the guesswork, uncertainty, arbitrariness and lack of uniformity with which this Court was concerned in Wilson and Malley-Duff, are not present in federal securities cases. Under the settled teachings of this Court in Wilson and Malley-Duff, the Third Circuit erred in overruling its prior decisions in Biggans and Roberts, and in extending the "uniform characterization" approach to federal

securities claims. This Court made it clear that this approach is applicable only in limited circumstances where the federal claim has no close state counterpart and can be arguably analogized to a multitude of state claims.[3]

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[3] The Court in Malley-Duff made it clear that there is no need to look to federal law to find the most analogous statute of limitations if there are comparable state law analogues. In cases arising under Sec. 10(b) and Rule 10b-5, there clearly are two such analogues in Pennsylvania -- common law fraud and the Blue Sky law -- one of which can be applied to any Sec. 10(b) or Rule 10b-5 claim depending upon a relatively simple set of facts.

C. The Third Circuit's Decision to Apply a Statute of Limitations Which Does Not Permit Tolling in Cases of Fraud that Go Undetected for More Than Three Years, Conflicts With the Controlling Precedents of the Supreme Court

In adopting the "one year/three year" statute of limitations discussed above, the Third Circuit disregarded this Court's precedents that "read into every federal statute of limitation" the equitable doctrine of fraudulent concealment. Holmberg v. Armbrecht, 327 U.S. 392, 397 (1946). For over a century, this Court has mandated that the equitable doctrine of tolling be applied to all statutes of limitations governing lawsuits sounding in fraud. The rationale is that "no man may take advantage of his own wrong." Glus v. Brooklyn Eastern District Terminal, 359 U.S. 231, 232 (1959). However, the Third

Circuit's decision in In re Data Access, affirmed in this case, requires that an action brought under Sec. 10(b) and Rule 10b-5 may under no circumstances be commenced more than three years after the fraud has occurred, regardless of whether the fraud was detected or even detectable during that three-year period. This erroneous prohibition against tolling is in direct conflict with the controlling precedents of this Court. For this reason as well, the Third Circuit erred in applying the limitations period it decided to apply to all federal securities fraud claims.

Due to the self-concealing nature of fraud, its victims are often unaware that they have been defrauded at the time the fraud is committed, and are unable to discover the facts giving rise to their

claims as long as the perpetrators of the fraud are able to conceal their wrongdoing. For this reason, this Court stated over a century ago, "[t]o hold that by concealing a fraud, or by committing a fraud in a matter that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure." Bailey v. Glover, 88 U.S. 342, 349 (1875). In Exploration Co. v. United States, 247 U.S. 435, 449 (1918), this Court reaffirmed "the rule...that statutes of limitations to set aside fraudulent transactions shall not begin to run until the discovery of the fraud." See also, Holmberg v. Armbrecht, 327 U.S. 392, 397

(1946); American Pipe & Construction Co. v. Utah, 414 U.S. 538, 559 (1974)("[I]n cases where the plaintiff has refrained from commencing suit during the period of limitation because of inducement by the defendant, or because of fraudulent concealment, this Court has not hesitated to find the statutory period tolled or suspended by the conduct of the defendant").

In failing to adhere to this Court's rulings that equitable tolling is mandatory in all cases of fraud, the Third Circuit rendered a decision which conflicts with the controlling authority of this Court. Indeed, this Court in Exploration Co. v. United States, at 247 U.S. 449, stated that it is the "universal rule" that tolling is to be

read into every limitations period governing fraud claims.

Moreover, in impposing an absolute three-year bar to bringing claims under Sec. 10(b) and Rule 10b-5, the Third Circuit's ruling will have the effect of encouraging securities law violators to conceal their wrongdoing from their victims, until the statute of limitations has run. Such a result, and the ruling of the Third Circuit, fly in the face of the controlling precedents of this Court. Similarly, the Third Circuit's adoption of an absolute three-year bar to bringing securities fraud claims, (regardless of when the facts constituting the violation are detected or even detectable), further supports the finding that it erred in applying the federal statute of

limitations it borrowed for all claims arising under Sec. 10(b) and Rule 10b-5.

D. The Third Circuit's Refusal to Decide the Prospectivity/ Retroactivity Issue Itself Conflicts With the Decisions of This Court and the Other Circuits

To review, the Third Circuit in this case refused to consider or decide the question of whether the new rule of law it adopted, i.e., the application of the "one year/three year" federal statute of limitations to all Sec. 10(b) and Rule 10b-5 claims, should be applied prospectively only and not retroactively to Northrop's claims. The Third Circuit remanded to the district court to decide this issue. In so holding, the Third Circuit relied on its decision in In re Data Access, which was also decided by the Third Circuit under 28 U.S.C. Sec.

1292(b). 843 F.2d at 1550-51. However, in In re Data Access, three judges dissented, arguing that, "the majority commits egregious error in not addressing and resolving" the retroactivity issue. Id., 843 F.2d at 1551. The district court in this case has not decided the issue because the Third Circuit stayed its mandate pending the filing of this petition.

The Third Circuit's refusal to decide the prospectivity/retroactivity question itself, conflicts with the controlling precedents of this Court. Relying upon Biggans, the district court entered an order denying the defendants' motion to dismiss; defendants had argued in their motion that those claims were time-barred. Because it relied on Biggans, the district court did not have

to address the retractivity issue. However, in his briefs filed with the Third Circuit, Northrop raised the prospectivity/retroactivity issue, and argued that under the controlling authority, a decision by the Third Circuit to apply a one-year statute of limitations should be given prospective effect only and should not be applied retroactively to his claims. In Dandridge v. Williams, 397 U.S. 471, 475 & n.6 (1970), this Court ruled that, "[t]he prevailing party may...assert in the reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court." See also, Mills v. Electric Auto-Lite Co., 396 U.S. 375, 381 & n.4 (1970). Accordingly, the fact that the district court did not consider the

prospectivity issue in denying the defendants' motion to dismiss (as it did not have to), is of no import. If the Third Circuit's ruling in In re Data Access does not apply retroactively to Northrop's claims, the district court's decision to apply the longer two-year statute of limitations to Northrop's claims under Biggans was still correct because Biggans was good law when the district court ruled.

As the dissent argued in In re Data Access, at 843 F.2d 1551: "Once it is realized that we are obligated to rule on the district court's order denying the motion to dismiss...on statute of limitations grounds, it necessarily follows that we must determine its correctness. This is so even though our court has now adopted a new rule of law

in reviewing the order." On appeal, the Third Circuit was obliged to rule on the correctness of the district court's order denying the motion to dismiss. Accordingly, under the teachings of this Court, it was also obliged to rule on the prospectivity/ retroactivity issue, because a determination of whether the district court's order was correct necessarily included resolution of that issue.

As the dissent noted in In re Data Access, supra, "it is commonplace for courts formulating a new or different rule of law to rule on its retroactivity at the same time." 843 F.2d at 1552. See, e.g., Northern Pipe Line Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). Furthermore, by ducking the prospectivity/retroactivity issue, the

Third Circuit has made "a mockery of the very objective of section 1292(b)." Id., 843 F.2d at 1552. It is almost a foregone conclusion that if the district court were to decide this issue in the first instance, the party who did not prevail on the issue would appeal again to the Third Circuit.

The Third Circuit's refusal to consider the prospectivity/ retroactivity issue also conflicts with the controlling precedents of other courts of appeals. As the Court noted in Walsh v. Ford Motor Company, 807 F.2d 1000, 1002 & n.2 (D.C. Cir. 1986), cert. denied, ____U.S.____, 107 S.Ct. 3188:

> Section 1292(b) explicitly provides, however, that the appeal is from an order of the district court, not from the particular question that the district court found controlling. We are therefore called upon to decide an

> appeal, not a single question of law. Accordingly, we must decide all questions of law necessary to the proper disposition of this appeal.

The Court in Walsh referred to this as a "well-established principle." Ibid. See also, San Filippo v. U.S. Trust Co. of New York, Inc., 737 F.2d 246, 255 (2d Cir. 1984), cert. denied, ____U.S.____, 105 S.Ct. 1408 ("Once we have taken jurisdiction over one issue in a case, we may, in our discretion, consider otherwise nonappealable issues in the case as well"); Parks v. Pavkovic, 753 F.2d 1397, 1402 (7th Cir. 1985), cert. denied, ____U.S.____, 106 S.Ct. 246 ("When an order in a case is properly appealed, the court of appeals can consider a closely related order if considering them together is more economical than postponing consideration

to a subsequent appeal"); Palmer v. City of Chicago, 806 F.2d 1316, 1318 (7th Cir. 1986), cert. denied, ____U.S.____, 107 S.Ct. 2180. In fact, the Third Circuit itself, in Johnson v. Alldredge, 488 F.2d 820, 823 (3d Cir. 1973), cert. denied, 419 U.S. 882 (1974), had embraced this principle:

> Since under the clear terms of Sec. 1292(b) we are called upon not to answer the question certified but to decide an appeal, we do not find ourselves bound by the District Judge's statement of the issue...In keeping with the purpose of Sec. 1292(b) to permit decision of legal issues as to which there is considerable question without requiring the parties first to participate in a trial that may be unnecessary, we proceed to a determination of the legal issues raised by the parties.

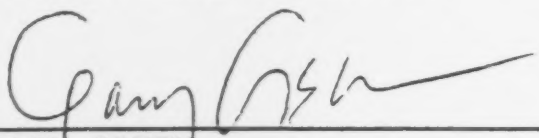
Accordingly, the Third Circuit's refusal to decide the prospectivity/ retroactivity issue directly conflicts

with the controlling precedents of this Court and with the decisions of other courts of appeals. It also conflicts with the Third Circuit's own prior holdings. For this reason as well, review by this Court of the Third Circuit's decision is necessary.

CONCLUSION

For all of the foregoing reasons, petitioner respectfully prays that this petition for a writ of certiorari be granted.

Respectfully submitted,



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ROBERT A. DAVITCH
On the Petition

DATED: September 16, 1988

APPENDIX

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-1038

JACK A. NORTHROP

v.

LEASE FINANCING CORPORATION and
FRANK P. SLATTERY, JR. and
RICHARD E. CARUSO

Appellants

On Appeal from the United States
District Court for the Eastern District
of Pennsylvania D.C. Civil Action
No. 87-2366
(Honorable Joseph L. McGlynn, Jr.)

Submitted Under Third Circuit Rule 12(6)
June 14, 1988

Before: MANSMANN, SCIRICA and COWEN,
Circuit Judges

(Filed June 24, 1988)

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OPINION OF THE COURT

PER CURIAM.

Pursuant to 28 U.S.C. Sec. 1292(b), the district court certified the following question for interlocutory appeal:

> What is the appropriate period of limitations in Pennsylvania for claims under Sec. 10(b) of the Securities and Exchange Act of 1934 in light of the United States Supreme Court's decision in Wilson v. Garcia, 471 U.S. 261 (1985) and it progeny in the Third Circuit.

App. at 153a.

On April 8, 1988, we concluded that recent decisions by the Supreme Court and this Court compelled us to "re-examine the reasoning and holdings" of our decisions applying state law as the applicable statute of limitations in Sec. 10(b) actions, which are not governed by

an express limitations period. In re Data Access Systems Securities Litigation, 843 F.2d 1537, 1549-50 (3d Cir. 1988)(en banc). Accordingly, we concluded that the express limitations in the Securities and Exchange Act of 1934 -- as opposed to limitations period in analogous state law -- "provide the preferable source of limitations borrowing." Id at 1550. Our decision in In re Data Access, therefore, has provided the answer to the question certified in this appeal.

Nevertheless, we noted in In re Data Access that the district court's certified question did not request that we address the issue of whether our ruling should "have prospective effect only and not apply to the present case." Based on that, we remanded for the

district court to decide the prospectivity issue. Id. at 1550-51; but see id. at 1551 (Seitz, J., dissenting).

We are now presented once again with the question whether In re Data Access should be applied prospectively only and not apply to this case. In this case, the district court's certification order did not pose the prospectivity question. Similarly, the issue is not addressed by the district court and was not raised by the parties. Thus, for the reasons stated in In re Data Access, we will remand to the district court for proceedings consistent with this opinion.

Each side to bear its own costs.

TO THE CLERK:

Please file the foregoing opinion.

_____
Circuit Judge

DATED:

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JACK A NORTHROP	:	CIVIL ACTION
	:	
vs.	:	
	:	
LEASE FINANCING CORP., et al.	:	NO. 87-2366

MEMORANDUM OF DECISION

McGLYNN, J. DECEMBER 16, 1987

This is an action brought by Jack A. Northrop against his former employer, Lease Financing Corporation ("LFC") and two of its officers, Frank P. Slattery and Richard E. Caruso. The Complaint, filed on April 24, 1987, alleges violations of the federal securities laws, 15 U.S.C. Sec. 78 et seq., specifically, Sec. 10(b) and Rule 10b-5 promulgated thereunder, as well as violation of the Age Discrimination in

Employment Act, 29 U.S.C. Sec. 261 et seq. In addition, plaintiff asserts pendent state law claims based on breach of an employment contract and alleged breaches of fiduciary duties by the defendants.

Presently before the court is defendant's Motion to Dismiss plaintiff's federal securities law claims and his pendent claim for breach of his employment contract. Defendants raise several alternative challenges to the federal securities claims including the statute of limitations. As to the breach of contract claim, defendant LFC points to an arbitration clause in the contract as a bar to this claim. Finally, defendants urge dismissal of the state law fiduciary claims on the ground that, assuming dismissal of the securities

claim, pendent jurisdiction is lacking because the remaining ADEA claim arises out of a distinct set of unrelated operative facts.[1]

In deciding defendant's Motion to Dismiss, this court must accept all factual allegations in plaintiff's First Amended Complaint as true. McNight v. Southeastern Pennsylvania Transportation Authority, 583 F.2d 1229, 1235-36 (3d Cir. 1978). A complaint should not be dismissed for failure to state a claim upon which relief may be granted "unless it appears beyond doubt that the

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[1] Assertion of pendent jurisdiction is appropriate only where the state law claim arises out of the same nucleus of operative fact as the federal claim to which it is pendent. United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966); Sims v. Faestel, 638 F.Supp. 1281, 1284 (E.D. Pa. 1986), aff'd, 813 F.2d 399 (3d Cir. 1987).

plaintiff can prove no set of facts in support of his claims that would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Accepting all plaintiff's well-pleaded allegations as true, the relevant facts are as follows.

I. FACTUAL BACKGROUND

Plaintiff, Jack Northrop, was hired by LFC in April of 1974 and worked as a "deal person" for LFC until September 26, 1985 when he was terminated. As a "deal person", Northrop was one of a number of employees who constructed business transactions involving financing and leasing services for LFC. In March of 1979, Northrop and LFC entered into a written agreement of employment which, by its terms, extended for successive three-year terms absent six months notice of intent to terminate

by either party.[2] Notice of termination was not communicated by either party and, therefore, the contract was automatically renewed in 1982 and again in 1985.

Under the employment contract, LFC agreed to pay plaintiff a stipulated salary in addition to which plaintiff was to receive an annual cash bonus which was to be calculated according to a formula set forth in the contract. In addition, the contract provided Northrop with protection from discharge absent "fraud, misappropriation, embezzlement, wilful

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[2] The operative effect of the automatic renewal provision is a matter of dispute, the resolution of which is not necessary for the purpose of disposing of the present motion. Plaintiff has pleaded sufficient facts to support his allegation that the contract was automatically renewed in March of 1982 and again in March of 1985.

misconduct, or the like," or breach of any "material provision" of the contract.

Northrop alleges that, beginning in February of 1985, LFC set about implementing a plan designed to purge the company of its older, more senior "deal persons" in favor of a group of younger, less qualified persons who, because of their lack of tenure, would perform the deal making function at a lesser cost to LFC. As part of that plan, Northrop alleges that LFC breached the employment contract and the ADEA[3] by wrongfully reducing Northrop's yearly bonus and terminating Northrop without just cause.

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[3] Defendants do not challenge the sufficiency of the complaint with respect to the ADEA claim.

These facts form the basis of plaintiff's ADEA and breach of contract claims.[4]

Northrop's Sec. 10(b) claim arises out of a chain of events that occurred in late 1984. In November of 1984, Northrop, along with defendants Slattery and Caruso, each held a right to sell all of their stock in LFC to Superior Tube Company ("Superior") under terms and conditions which were set forth in a "Stock Purchase Agreement." At that time, Slattery and Caruso[5] advised

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[4] The state law claim for breach of fiduciary duty appears to encompass the facts underlying the alleged securities fraud as well as certain of the employment related claims. Plaintiff alleges that his LFC stock and his yearly bonus money was held by defendants in a "fiduciary capacity."

[5] Plaintiff alleges that Slattery and Caruso were, at all material times, acting as agents and officers of LFC in the course of their employment. In addition, plaintiff alleges that the

(footnote continued on following page)

Northrop that they intended to exercise their right to sell before the end of the year if Northrop would agree to sell as well. Northrop agreed, relying on statements by Slattery and Caruso that it would be "monetarily advantageous" for all to sell together before the end of the year.[6] In fact, by December 29, 1984, Slattery and Caruso had decided not

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officers acted for the purpose of benefiting LFC and that LFC participated directly in the conspiracy. Under these circumstances, agency principles provide the basis for the liability of LFC. See Rochez Bros., Inc. v. Rhoades, 557 F.2d 880, 884 (3d Cir. 1975); Sharp v. Coopers & Lybrand, 649 F.2d 175, 182 & n.8 (3d Cir. 1981). I need not consider whether respondeat superior liability would be appropriate on these facts.

[6] Plaintiff alleges that Slattery and Caruso were insiders of LFC but that, despite his status as a shareholder and employee of LFC, he was not an insider and did not enjoy access to the information necessary to uncover the alleged fraud.

to sell their stock because it would not be financially advantageous to sell at that time.

Northrop alleges that Slattery and Caruso fraudulently concealed from him their decision not to sell their stock as the parties had agreed. They did this, according to Northrop, for the purpose of inducing him to part with his LFC stock so it would be easier later to fire him and to obtain a greater interest in and control of the company. In a letter dated December 31, 1984, Slattery consummated the sale of Northrop's stock which he held in a trust capacity[7] and

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[7] At paragraph 79 of plaintiff's First Amended Complaint, he alleges that Slattery held his share of LFC in a trust capacity. The existence of a trust relationship between Slattery and Northrop is a matter of dispute. At this stage, however, I must accept plaintiff's allegation as true. See McNight v. Southeastern Pennsylvania Transportation

(footnote continued on following page)

confirmed his and Caruso's decision not to participate in the transaction. Northrop alleges that the December 31 letter was fraudulently concealed by the defendants until February of 1986, when Northrop gained access to the letter during settlement discussions and, for the first time, realized that he had been defrauded.

II. THE SECURITIES CLAIM

A. STATUTE OF LIMITATIONS

There is no specific statute of limitations governing claims asserted under Section 10(b) and Rule 10b-5 and, therefore, federal courts must look to state law to determine the appropriate period of limitations. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 210 n.29

Authority, 583 F.2d 1229, 1235-36 (3d Cir. 1978).

(1976). The dispositive issue here is whether the one-year statute of limitations found in the Pennsylvania Securities Act[8] or the longer statutory period for common law fraud[9] should apply to plaintiff's claims.

Relying on the Third Circuit's decision in Biggans v. Bache-Halsey Stuart Shields, 638 F.2d 605 (3d Cir. 1981), cert. denied, 455 U.S. 938 (1982), Northrop argues that the two-year statute

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[8] See Pennsylvania Securities Act of 1972, 70 Pa.Cons.Stat.Ann. Sec. 1-504(a) (Purdon Supp. 1986). Section 504(a) provides that "[n]o action shall be maintained to enforce any liability created under [the Act] one year after the plaintiff receives actual notice or upon the exercise of reasonable diligence should have known of the facts constituting the violation." Id.

[9] See 42 Pa.Cons.Stat.Ann. Sec. 5524(7) (Purdon Supp. 1987). This section provides a two-year statute of limitations for common law fraud actions.

for common law fraud governs his claim. In Biggans, the Court of Appeals for the Third Circuit held that the Pennsylvania statute of limitations for common law fraud should be applied in a Section 10(b) case where, due to an absence of privity between the parties, the Pennsylvania blue sky laws would not provide a cause of action for monetary relief. Id. at 610. Judge Sloviter wrote:

> Where the state Blue Sky law does not provide the plaintiff with a cause of action for the relief requested, but common law does, and where the state legislature framed its statute to supplement, rather than supplant, available common law remedies, it is the common law limitations period which must be applied in federal securities action.

Id.

Northrop argues that, due to the absence of privity between him and the

named defendants in the transaction at issue,[10] Biggans compels application of the two-year common law fraud limitations period. Since the fraud was allegedly concealed until February of 1986,[11] Northrop argues that this action is timely.

Defendants attach the present vitality of Biggans -- not its application to these facts. Relying on the United States Supreme Court's holding in Wilson v. Garcia, 471 U.S. 261 (1986),

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[10] Plaintiff sold his stock in LFC to Superior Tube Company. Superior is not named as a defendant nor has it been joined in this action by defendants.

[11] The question whether plaintiff has sufficiently pleaded fraudulent concealment under Rule 9(b) is resolved in favor of plaintiff infra.

and its progeny in the Third Circuit,[12] defendants argue that the single most analogous state statute of limitations must be chosen for application to all Sec. 10(b) claims and that the state blue sky limitations period is the most appropriate choice. In Wilson, the Supreme Court rejected the practice of applying diverse limitations periods to Sec. 1983 claims. The Court held that the single most appropriate state limitations period would govern all Sec. 1983 claims since the choice of limitations is essentially a federal question which, because of the need for

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[12] See Malley-Duff & Associates v. Crown Life Ins. Co., 792 F.2d 341 (3d Cir. 1986); Goodman v. Lukens Steel Co., 777 F.2d 113 (3d Cir. 1985). These cases are discussed, infra.

uniformity, should not be controlled by the vagaries of state law.

The Third Circuit has recognized the applicability of the Wilson rationale beyond the context of Sec. 1983. See, Malley-Duff & Associates v. Crown Life Ins. Co., 792 F.2d 341 (3d Cir. 1986) (Wilson rationale applied in context of civil RICO claim); Goodman v. Lukens Steel Co., 777 F.2d 113 (3d Cir. 1985)(Wilson extended to claims under Sec. 1981). The Malley-Duff court set forth the Wilson approach as follows:

> First, we must determine whether it is state or federal law that controls the characterization of the claim. Second, we must decide whether all claims arising under a particular federal law "should be characterized in the same way, or whether they should be evaluated differently depending upon the varying factual circumstances and legal theories presented in each individual case." Finally, "we must

> characterize the essence of the claim in the pending case, and decide which state statute provides the most appropriate limiting principle." 105 S.Ct. at 1943.

Malley-Duff, 792 F.2d at 345. The court noted that the Wilson three-part inquiry was intended "to mark out a general approach to all statute of limitations borrowing problems." Id. at 345 n.9.

It appears, therefore, that the base upon which the Biggans court rested its decision has been eroded to such a degree that a reexamination of the statute of limitations borrowing analysis espoused by the Biggans court is appropriate. It is not, however, within the province of this court to engage in such a reexamination.[13] "As an inferior

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[13] I am constrained in this regard by principles of stare decisis. Professor Moore has stated:
(footnote continued on following page)

court in the federal hierarchy, we are, of course, compelled to apply the law as we find it on the day of our decision." United States v. City of Philadelphia, 644 F.2d 187, 92 n.3 (3d Cir. 1980).

Despite its questionable vitality, I am bound by the rule set forth in Biggans.[14] Thus, Northrop's Sec. 10(b)

> [S]tare decisis applies not only to successive decisions in the same court, but also to decisions in courts owing obedience to that court. In this context, the principle of conformity is more rigid.... [T]he district courts in a circuit owe obedience to a decision of the court of appeals in that circuit and must follow it until the court of appeals sees fit to overrule it.

Moore, Moore's Federal Practice, Vol 1B, at 14 (2d ed. 1984).

[14] I am joined in this regard by Judge Scirica, who, on two occasions this year, rejected invitations to depart from the rule set forth in Biggans. See Kiev v. Dion, C.A. No. 84-6404, slip op. at 6

(footnote continued on following page)

claim is governed by Pennsylvania's two-year statute of limitations for common law fraud. Defendant's Motion to Dismiss will be denied. Given the controlling nature of the question, however, and the likelihood that immediate resolution could materially advance this litigation, I will certify the question for interlocutory appeal pursuant to 28 U.S.C. Sec. 1292(b)(1985).

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n.3 (E.D. Pa. June 30, 1987); Sowell v. Butcher & Singer, Inc., C.A. no. 84-0714, slip op. at 9 n.4 (E.D. Pa. May 12, 1987); but cf. Cohen v. McAllister, No. 87-90 (W.D. Pa. Nov. 12, 1987)(adopting the Wilson approach to determining statute of limitations under Rule 10b-5 in context not directly controlled by Biggans). The Wilson rationale has been applied in the context of Rule 10b-5 by the Court of Appeals for the Eleventh Circuit. See Friedlander v. Troutman, Sanders, Lockerman, 788 F.2d 1500, 1505-07 (11th Cir. 1986).

B. RULE 9(b)

Assuming, as I have determined, that the two-year statute of limitations for common law fraud applies here, defendants argue that plaintiff's complaint is time barred since the fraud occurred more than two years before the filing of the present action. In response, plaintiff claims the protection of the federal equitable tolling doctrine. Plaintiff argues that defendants' fraudulent concealment of the facts underlying the alleged fraud tolled the running of the statute until February of 1986, when the plaintiff discovered the fraud. At this juncture, the dispute focuses on whether Northrop has pleaded the fraudulent concealment with sufficient particularity to satisfy the requirements of Rule 9(b).

Rule 9(b) of the Federal Rules of Civil Procedure requires that a party set forth with particularity in the pleadings any claim of fraud. Fed.R.Civ.P. 9(b). The standard set forth in Rule 9(b) has been held to apply to claims of fraudulent concealment offered in support of a party's claim to the protection of the federal equitable tolling doctrine. See Teamsters Local 282 Pension Trust Fund v. Angelos, 815 F.2d 452, 456 (7th Cir. 1987); Bethlehem Steel Corp. v. Fischbach and Moore, Inc., 641 F.Supp. 271, 273 (E.D. Pa. 1986); Alfaro v. E.F. Hutton & Co., Inc., 606 F.Supp. 1100, 1110 (E.D. Pa. 1985). It is generally accepted that the three elements to a claim of fraudulent concealment are: (1) wrongful concealment of the alleged wrong by the defendants; (2) failure of the

plaintiff to discover the operative facts or the basis of his cause of action; and, (3) plaintiff's due diligence in discovering the facts. Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389 (6th Cir. 1975). I will address each of these elements in turn.

1. **WRONGFUL CONCEALMENT**

Defendants contend that Rule 9(b) requires, without exception, that specific affirmative acts of concealment on the part of the defendants be set forth in the pleadings. In addition, defendants argue that the act or acts of concealment must be independent of the underlying fraud. I disagree.

The equitable tolling doctrine finds its roots in Baily v. Glover, 88 U.S. (21 Wall.) 342, 348-50 (1875). The Baily Court set forth the rule as

follows, noting that statutes of limitation:

> were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence that would show that such rights never existed, or had been satisfied, transferred or extinguished, if they ever did exit. To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the Statute of Limitations to protect it, is to make the law which was designed to prevent fraud, the means by which it is made successful and secure.... [W]e hold that when there has been no negligence of laches on the part of the plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to the party suing, or those in privity with him.

Id. at 349-50 (emphasis added).

Since Baily, a distinction has been maintained under the equitable tolling doctrine between cases, such as fraud, where the concealment is inherent in the nature of the act, and other cases, such as conversion or the like, where the facts giving rise to the cause of action are apparent to the victim, and subsequent acts of concealment are necessary to secret the identity of the perpetrator. See Hobson v. Wilson, 737 F.2d 1, 33 (D.C. Cir. 1984); Foltz v. U.S. News & World Report, 663 F.Supp. 1494, 1537 (D.D.C. 1987); Bethlehem Steel Corp. v. Fischbach, 641 F.Supp. 271, 274 (E.D. Pa. 1986). In cases in the former category, a requirement that affirmative acts of concealment independent of the underlying fraud be pleaded would convert Rule 9(b) into a haven for sophisticated

defrauders. The perpetrator of a self-concealing fraud need not perform independent acts of concealment to mask his identity. The non-occurrence of such acts of concealment necessarily prevents their being pleaded. See e.g., City of Philadelphia v. Nucero, C.A. No. 86-3628, slip op. at 3-8 (E.D. Pa. March 13, 1987).

Here, plaintiff has alleged that defendant engaged in a conspiracy to fraudulently induce plaintiff to exercise his option to sell the LFC stock. The conspiracy involved control persons enticing plaintiff to part with his stock by convincing him, by their words as well as their feigned participation in the transaction, that the sale would be "financially advantageous." The success of the alleged conspiracy depended upon

its self-concealing nature. Plaintiff's Complaint is sufficient, therefore, in setting forth a self-concealing fraud. It follows that not independent acts of concealment need by pleaded to survive the Motion to Dismiss.

2. DISCOVERY AND DUE DILIGENCE

Northrop alleges that he was unaware of the fraud until February of 1986, when a letter was tendered by defendants' counsel which disclosed that Slattery and Caruso had not sold their LFC stock as agreed in December of 1984. Therefore, he has adequately pleaded his failure to discover the alleged fraud. Defendants do not dispute the sufficiency of the pleading in this regard.

Defendants contend, however, that plaintiff has failed to allege specific facts in support of his claim of due

diligence. At paragraph 83 of Northrop's First Amended Complaint, he asserts that he "acted with reasonable diligence and is diligence did not lead to the discovery that defendants had kept their stock and defrauded him, until February of 1986." Whether a party has exercised due diligence "is a factual issue which cannot be decided on a motion to dismiss unless it appears beyond doubt that plaintiff can prove no facts to support the claim." Bethlehem Steel, 641 F.Supp. at 275; Nucero, slip op. at 8. Northrop's allegation of due diligence is sufficient under this standard to survive the present Motion to Dismiss.

Where plaintiff is the victim of a self-concealing fraud, due diligence will often be articulable only in conclusory fashion. This is so because the

existence of specific affirmative investigatory measures will often be lacking where plaintiff has been deceived as to the existence of the wrong. I decline defendants' invitation to apply Rule 9(b) so rigidly as to require the pleading of affirmative acts in support of a claim of due diligence in all cases. In doing so, I am mindful of the Third Circuit's direction that, in applying Rule 9(b), "courts must be sensitive to the fact that its application, prior to discovery, may permit sophisticated defrauders to successfully conceal the details of their fraud." Christidis v. First Pennsylvania Mortgage Trust, 717 F.2d 96, 100 (3d Cir. 1983). The Motion to Dismiss the securities claim for failure to comply with the pleading requirements of Rule 9(b) will be denied.

C. SECTION 10(b) -- FAILURE TO STATE A CLAIM

Defendants additionally contend that Northrop's Sec. 10(b) claim fails to state certain required elements. In order to state a claim under Rule 10b-5, a plaintiff must allege that the defendant engaged in some misrepresentation or fraud in connection with the purchase or sale of a security. Ketchum v. Green, 557 F.2d 1022, 1025 (3d Cir.), cert. denied, 434 U.S. 940 (1977). In addition, a plaintiff must allege that the misstatement or omission was of a material fact and, relying on the misstatement or omission, plaintiff traded or refrained from trading. Chiarella v. United States, 445 U.S. 222 (1980). Finally, plaintiff must allege the requisite causation and scienter. Angelastro v. Prudential-Bache

Securities, Inc., 754 F.2d 939 (3d Cir. 1985).

First, defendants argue that plaintiff has failed to plead the basis for a "duty to disclose" on the part of the defendants. Relying on Chiarella v. United States, 445 U.S. 222 (1980), and Dirks v. S.E.C., 463 U.S. 646 (1983), defendants argue that a "fiduciary or other relation of trust and confidence" must be pleaded in order to state a claim based on an omission to state material facts. Defendants argue that no such relationship has been pleaded here.

Defendants' argument appears to be based on a misreading of plaintiff's Complaint. Northrop alleges the occurrence of affirmative misrepresentations as the basis for his claim of fraud. Plaintiff alleges that

the defendants made representations to the effect that exercise of the option would be "financially advantageous," but that, in fact, the contrary was true. Knowing, as insiders, that the sale was not in their best interest, defendants decided no to participate in the transaction but, for their own purposes, feigned continued participation for the purpose of inducing plaintiff to go through with the deal. In short, plaintiff alleges that the defendants made affirmative misrepresentations and failed to state material facts necessary to make the statements, in light of the circumstances in which they were made, not misleading.

This is not a case where absolute silence in the face of a duty to disclose is alleged, as was the case in Chiarella

and Dirks. The Chiarella and Dirks decisions were intended to define the scope of the duty to disclose for one trading on nonpublic information. in such cases, the duty to disclose is limited to cases in which fiduciary principles compel a degree of fairness. Here, the complaint focuses on affirmative representations of fact which, in light of subsequent events, were either false when made or, alternatively, created a misleading impression when combined with the nondisclosure of all the relevant facts. In such cases, involving nondisclosure of facts necessary to purge prior communications of their misleading quality, the "duty to disclose" arises from the Rule itself. See Kronfeld v. First Jersey National Bank, 638 F.Supp.

1454, 1467 (D.N.J. 1986)(allegation of fiduciary or other relation of trust not necessary where affirmative misrepresentations form basis of complaint); City of Harrisburg v. Bradford Trust Co., 621 F.Supp. 463, 473-74 (M.D. Pa. 1985)(duty to disclose arises regardless of fiduciary or trust relationship where disclosure of further facts is necessary to prevent prior communications from misleading); Marrero v. Banco di Roma, 487 F.Supp. 568, 575 (E.D. La. 1980)(same).

Defendants argue further that, even assuming that misrepresentations were made, they cannot be liable under Rule 10b-5 because they did not benefit from the alleged fraud. Courts have generally held that, in order to state a claim under Rule 10b-5 against a party

who operates independent of both the purchaser and seller in the course of the transaction, one must allege that the third party stood to benefit in some way from the transaction at issue. See e.g., Marrero, 487 F.Supp. at 572. The Marrero court described such parties as "a new class of secondary defendants -- those noninsiders who allegedly misrepresent or omit material facts during the course of a securities sale for their own purposes, acting independently of both the seller and the purchaser." Id. It is true that the defendants here fall within this class of secondary defendants. However, I reject defendants' argument that no benefit has been pleaded here.

Northrop alleges in his Complaint that the sale of plaintiff's stock in LFC "made it easier for [defendants] to fire

plaintiff and to obtain for themselves a greater interest in, greater control of and more profits from LFC." Plaintiff's First Amended Complaint, para. 78. Defendants contend that the transfer of stock by Northrop to Superior could not possibly increase the interest, control or profit sharing of the defendants. Plaintiff responds, however, that the sale of stock enabled defendants to carry out a scheme designed to eliminate plaintiff from sharing in the profit based bonus pool at LFC. A fair reading of plaintiff's Complaint reveals that a benefit to each defendant has been pleaded. At this stage of the proceedings, I am bound to accept these allegations as true. See McNight v. Southeastern Pennsylvania Transportation Authority, 583 F.2d 1229, 1235-36 (3d

Cir. 1978). Defendants' argument regarding the truth of these allegations is, therefore, inappropriate at this stage.

Defendants argue further that the alleged misrepresentations and omissions were not of material fact. The question of materiality, however, is peculiarly within the province of the jury, requiring as it does an assessment of what a "reasonable person" would consider important in making an investment decision. See TSC Industries v. Northway, Inc., 426 U.S. 438, 450 (1976). Plaintiff alleges that he considered the defendant insiders' representations concerning the wisdom of the sale as the controlling factor in his decision to part with his LFC shares. I find plaintiff's allegations to be sufficient.

Similarly, defendants challenge the sufficiency of plaintiff's allegations of reliance. Defendants argue that any reliance on their representations of fact could not possibly be reasonable since plaintiff was himself a sophisticated insider at LFC and, as such, had access to the information necessary to uncover that the representations were in fact false. See Hartnett v. Ryan Homes, Inc., 360 F. Supp. 878, 885 (E.D. Pa. 1973) (suggesting that one insider cannot maintain an action against another insider for nondisclosure of inside information), aff'd, 496 F.2d 832 (3d Cir. 1974). The question whether reliance was reasonable on a given set of facts, however, should not be resolved at the pleading stage. Bradford Trust, 621

F. Supp. at 472. Moreover, it is well settled that a claimant is entitled to a presumption that reliance was reasonable where a showing of materiality is made. See Affiliated Ute Citizens v. United States, 406 U.S. 128, 153-54 (1972); Sharp v. Coopers & Lybrand, 649 F.2d 175 (3d Cir. 1981).

I need not reach the question whether an insider could ever be said to have reasonably relied on misrepresentations of fact concerning the internal affairs of the corporation. Northrop's Complaint specifically alleges that, despite Northrop's status as a shareholder and employee, he was not in fact an insider at LFC and defendants had access to information that was not available to him.

Finally, defendants challenge the sufficiency of Northrop's allegations of causation. The element of causation is perhaps the most complex of the elements under Rule 10b-5. The question whether a given complaint is sufficient in pleading causation involves a two-pronged inquiry. See In re Catanella and E.F. Hutton & Co., 583 F. Supp. 1388, 1414-17 (E.D. Pa. 1984). First, it must be alleged that the misrepresentation or omission was the "but for" cause of plaintiff's decision to engage in, or refrain from engaging in the transaction at issue. Id. This prong of the causation analysis, commonly referred to as "transaction causation," is inextricably related to and dependent upon the question of reliance -- that is, whether the plaintiff in fact participated in the

transaction as a direct result of the defendants' fraudulent conduct. Here, plaintiff alleges that his sale of LFC stock was the direct result of defendants' misrepresentation concerning the advisability of the transaction. Plaintiff alleges that the misrepresentation included feigned participation in the sale by the defendant insiders. Transaction causation has been sufficiently pleaded.

The focus of defendants' argument is on the second prong of the causation inquiry. This second prong, referred to as "loss causation," requires an inquiry into the relationship between the misrepresentation or omission on one hand and the resulting economic loss to the plaintiff on the other. Catanella, 583 F. Supp. at 1414-16; Huddleston v. Herman

& Maclean, 640 F.2d 534, 549 & n.24 (5th Cir. 1981), aff'd in part and rev'd in part on other grounds, 459 U.S. 375 (1983). In short, "loss causation requires that the plaintiff prove that the misrepresentation or omission related to factors which eventually played a part in the economic loss suffered by the plaintiff. Assuming a misrepresentation of material fact which is relied upon by plaintiff, the fact remains that the plaintiff cannot recover for losses due to market forces unrelated to the misrepresented or omitted fact. The Huddleston court offered the following example:

> For example, an investor might purchase stock in a shipping venture involving a single vessel in reliance on a misrepresentation that the vessel had a certain capacity when in fact it had less capacity than was represented in

> the prospectus. However, the prospectus does disclose truthfully that the vessel will not be insured. One week after the investment the vessel sinks as a result of a casualty and the stock becomes worthless. In such circumstances, a fact-finder might conclude that the misrepresentation was material and relied upon by the investor but that it did not cause the loss.

Huddleston, 640 F.2d at 549 n.25. Thus, the misrepresentation must touch upon factors which are eventually operative in causing the plaintiff's pecuniary loss.

Here, defendants argue that nondisclosure of their decision not to sell their LFC shares did not relate to factors which could have eventually caused plaintiff's loss. Defendants argue that their failure to sell their stock had no effect on the eventual market price of LFC stock. Again, defendants' argument is based on a

mischaracterization of plaintiff's Complaint. Northrop alleges that the defendants fraudulently misrepresented the expected growth and profits of LFC by feigning participation in a staged bailout and indicating that the sale would be financially prudent. In fact, the company's prospects were good and plaintiff alleges that defendants knew of the expected growth in profits. Plaintiff's First Amended Complaint, para. 78. Plaintiff's pecuniary loss in being deprived of his share of that growth was, on the facts pleaded, directly related to the substance of the fraudulent representations concerning the advisability of the sale of LFC stock. Plaintiff has sufficiently pleaded causation in all respects. The Motion to

Dismiss Counts III of the Complaint will be denied.

III. THE EMPLOYMENT CONTRACT AND ARBITRABILITY

In Count II of his First Amended Complaint, Northrop alleges that LFC wrongful terminated his employment and denied him bonus compensation in breach of his contract of employment. LFC moves to dismiss this count on the ground that an arbitration provision in plaintiff's employment contract precludes maintenance of the present breach of contract claim. The relevant provision of the employment contract provides:

> FOURTH: Should the Company and the Executive disagree as to the existence of circumstances entitling the Company to terminate the Executive's employment hereunder, the parties will, at the Executive's or the Company's request, submit the issue to arbitration under the rules of the American Arbitration Association and the

> finding in such arbitration shall be conclusively binding upon the parties. The costs of such arbitration shall be shared equally by the Executive and the Company.

It is well settled under Pennsylvania law that arbitration provisions are enforceable absent grounds which, at law or equity, would entitle a party to relief from the contractual undertaking. See Capecci v. J. Capecci, Inc., 392 Pa. 32, 139 A.2d 563 (1958); Borough of Ambridge Water Authority v. Columbia, 458 Pa. 546, 328 A.2d 498 (1974); Flightways Corp. v. Keystone Helicopter Corp., 459 Pa. 660, 331 A.2d 184 (1975). Furthermore, the Supreme Court of the United States has directed that claims subject to an arbitration provision be dismissed to arbitration despite the inefficiency that may result from bifurcating claims that are not

subject to mandatory arbitration. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218-19 & n.5 (1985). I approach the issue mindful of these considerations.

Northrop argues that certain of the contractual claims do not fall within the coverage of the arbitration provision. In support of this argument, plaintiff asserts that the scope of the clause is limited to cases where the parties disagree over the existence of circumstances giving rise to a right to terminate plaintiff -- that is, the clause is limited to disputes involving discharge. Defendants do not dispute that the clause is limited to such disputes.

Since the duty to arbitrate arises solely from the contractual provision, a party cannot be compelled to arbitrate

that which falls outside the scope of the clause. See Federated Metals Corp. v. United Steelworkers, 648 F.2d 856, 858-59 (3d Cir. 1981). Therefore, to the extent that plaintiff asserts claims for breach of contract other than the alleged wrongful termination, defendants' Motion to Dismiss must be denied.

With regard to the breach of contract claim that focuses on termination, plaintiff concedes that this claim falls within the scope of the arbitration clause. Plaintiff argues, however, that defendants have waived their right to compel arbitration. In support of this argument, Northrop points to a letter sent by him to LFC on September 26, 1985 in which he purported to request arbitration under the

contract.[15] Northrop argues that defendants' failure to respond to his request or initiate arbitration proceedings should be construed as a waiver of the right to compel arbitration. I disagree.

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[15] Defendants' failure to respond to Northrop's letter cannot be construed as a waiver. First, the letter was ineffective because the rules of the American Arbitration Association which, according to the contract, were to govern the arbitration, require the filing of a request in a Regional Office of the Association. Therefore, the letter did not constitute a formal request. See Commercial Arbitration Rules of the American Arbitration Association, Rule 9 (1986). Even assuming the letter did constitute a formal request, the failure of the arbitration proceedings to move forward was in no way the fault of defendants. Plaintiff has alleged no facts that could support the notion that defendants resisted arbitration affirmatively. Defendants were under no obligation to commence arbitration proceedings in the proper fashion merely because plaintiff requested arbitration informally. Therefore, their failure to do so cannot be construed as a waiver.

A finding that party has waived the right to compel arbitration under a contract requires the existence of conduct on the part of that party clearly manifesting an intent to utilize the judicial process despite the arbitration clause and prejudice to the party resisting arbitration. See Gavlik Construction Co. v. H.F. Campbell Co., 526 F.2d 777, 783 (3d Cir. 1975); Prodex, Inc. v. Legg Mason Wood Walker, Inc., C.A. No. 86-1950 (E.D. Pa. February 5, 1987); Miller v. E.W. Smith Co., 581 F.Supp. 817 (E.D. Pa. 1983). Where a party delays requesting arbitration and takes advantage of discovery and other aspects of the judicial process, and this delay results in lost time or expense or other prejudice to the opposing party, a finding of waiver is appropriate.

Miller, 581 F. Supp. at 820 (party delayed request for discovery until discovery had closed and case was ready for trial).

Here, defendant has moved to dismiss and compel arbitration of Count II before any discovery or proceedings on the merits have been conducted. LFC has taken no action in this litigation that could be construed as inconsistent with its request to compel arbitration. Their request to compel arbitration is, in fact, the only action that has been taken with respect to Count II. Under these circumstances, plaintiff has established neither a clear intent to abjure the commitment to arbitration on the part of LFC nor any prejudice to him in being required to submit to arbitration. Therefore, to the extent that Northrop's

claim seeks recovery for breach of contract in terminating his employment, the motion will be granted. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JACK A NORTHROP	:	CIVIL ACTION
	:	
vs.	:	
	:	
LEASE FINANCING CORP., et al.	:	NO. 87-2366

O R D E R

AND NOW, this 16th day of DECEMBER, 1987, upon consideration of Defendants' Motion to Dismiss the Second, Third and Fourth Counts of Plaintiff's First Amended Complaint, and Plaintiff's Memorandum of Law in opposition thereto, it is hereby

ORDERED

that:

(1) The Motion to Dismiss Count Three of the First Amended Complaint is DENIED;

(2) The Motion to Dismiss Count Four of the First Amended Complaint is DENIED;

(3) The Motion to Dismiss Count Two of the First Amended Complaint is GRANTED IN PART AND DENIED IN PART. To the extent the claim set forth in Count Two is based on Plaintiff's discharge, the Motion is GRANTED. In all other respects, the Motion is DENIED.

(4) The following question is certified for interlocutory appeal pursuant to 28 U.S.C. Sec. 1292(b):

> What is the appropriate period of limitations in Pennsylvania for claims under Sec. 10(b) of the Securities and Exchange Act of 1934 in light of the United States Supreme Court's decision in Wilson v. Garcia, 471 U.S. 261 (1985) and its progeny in the Third Circuit.

In the event that an appeal is taken, these proceedings shall be stayed pending resolution of the appeal.

BY THE COURT:

Joseph L. McGlynn, Jr. /s/
JOSEPH L. McGLYNN, JR. J.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-1038

NORTHROP, Jack A.

vs.

LEASE FINANCING CORPORATION et al.,

Appellants

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is O R D E R E D that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby further stayed until September 22, 1988.

Circuit Judge

Dated: Aug 22, 1988

APPENDIX D

Section 10(b) of the Securities Exchange Act, 15 U.S.C. Sec. 78j(b):

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or any facility of any national securities exchange--
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 10b-5 promulgated by the Securities and Exchange Commission, 17 C.F.R. Sec. 240.10b-5:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate

commerce, or of the mails or of any facility of any national securities exchange,

* * *

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading...in connection with the purchase or sale of any security.

Section 18(c) of the Securities Exchange Act, 15 U.S.C. Sec. 78r(c):

Liability for misleading statements

* * *

(c) No action shall be maintained to enforce any liability created under this section unless brought within one year after the discovery of the facts constituting the cause of action and within three years after such cause of action accrued.

Section 29(b) of the Securities Exchange Act, 15 U.S.C. Sec. 78cc(b):

Validity of contracts

* * *

(b) Every contract made in violation of any provision of this chapter or of any rule or regulation thereunder, and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this chapter or any rule or regulation thereunder, shall be void (1) as regards the right of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule, or regulation: Provided, (A) That no contract shall be void by reason of this subsection

because of any violation of any rule or regulation prescribed pursuant to paragraph (2) or (3) of subsection (c) of section 78o of this title, and (B) that no contract shall be deemed to be void by reason of this subsection in any action maintained in reliance upon this subsection, by any person to or for whom any broker or dealer sells, or from or for whom any broker or dealer purchases, a security in violation of any rule or regulation prescribed pursuant to paragraph (1) of subsection (c) of section 78o of this title, unless such action is brought within one year after the discovery that such sale or purchase involves such violation and within three years after such violation.

Section 9(e) of the Securities Exchange Act, 15 U.S.C. Sec. 78i(e):

Manipulation of security prices

* * *

(e) Any person who willfully participates in any act or transaction in violation of subsections (a), (b), or (c) of this section, shall be liable to any person who shall purchase or sell any security

at a price which was affected by such act or transaction, and the person so injured may sue in law or in equity in any court of competent jurisdiction to recover the damages sustained as a result of any such act or transaction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorney's fees, against either party litigant. Every person who becomes liable to make any payment under this subsection may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment. No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation.

SUPREME COURT, U.S.
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No. 88-483

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JACK A. NORTHROP,
Petitioner,

v.

LEASE FINANCING CORPORATION,
FRANK P. SLATTERY, JR., and
RICHARD E. CARUSO,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Do the federal interests in uniformity, certainty and preservation of scarce judicial resources require application of a single statute of limitations for all causes of action under section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder?

2. Does the interstate nature of causes of action under section 10(b) and Rule 10b-5 and the substantive purposes of the federal securities laws require the application of a federal statute of limitations?

3. Should the Court's ruling on the foregoing issues be applied to the litigants in this case?

STATEMENT OF CORPORATE RELATIONSHIPS

Respondent Lease Financing Corporation is owned by LFC No. 40 Corp., which is owned by LFC Financial Corp., which is owned by Cawsl Enterprises, which is owned by Cawsl Corp. Lease Financing Corporation is affiliated with LFC Management Corporation, Ashvale Leasing Corporation, Axminster Leasing Corporation, Chesham Leasing Corporation, Hansell Leasing Corporation, Highgate Leasing Corporation, Kingman Leasing Corporation, LFC Management Corporation, LFC No. 4 Corp., LFC No. 7 Corp., LFC No. 8 Corp., LFC No. 9 Corp., LFC No. 10 Corp., LFC No. 12 Corp., LFC No. 13 Corp., LFC No. 14 Corp., LFC No. 15 Corp., LFC No. 17 Corp., LFC No. 20 Corp., LFC No. 21 Corp., LFC No. 22 Corp., LFC No. 24 Corp., LFC No. 27 Corp., LFC No. 28 Corp., LFC No. 30 Corp., Oxshott Leasing Corporation, Parkview Leasing Corporation, Regents Leasing Corporation, Southwark Leasing Corporation, and Weymouth Leasing Corporation.

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LEASE FINANCING CORPORATION,
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RICHARD E. CARUSO,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Lease Financing Corporation, Frank P. Slattery, Jr., and Richard E. Caruso ("respondents") respectfully request that the Court deny the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit submitted by petitioner Jack A. Northrop ("Northrop").

STATEMENT OF JURISDICTION

The judgment of the court of appeals was filed June 24, 1988, and this Court has jurisdiction to review that judgment by writ of certiorari pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Northrop filed suit against respondents alleging violation of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §78, *et seq.*, specifically §10(b) and Rule 10b-5 promulgated thereunder, which provided the basis for federal jurisdiction in the district court.

Northrop did not commence this action until more than one year after he acknowledged discovery of the alleged fraud. Thus, this action is time barred under the one year limitation set forth in the federal securities laws and would be time barred under the Pennsylvania Securities Act.[1] The action would be timely only applying Pennsylvania's two year limitation for common law fraud.[2]

Respondents moved to dismiss, urging that Northrop's federal securities claim was barred by the one year statute of limitations. The district court, applying a claim by claim approach to borrowing a limitations period, held that the two year limitations period for common law fraud was applicable. However, the court questioned the continued validity of this approach and certified the following question for interlocutory appeal to the United States Court of Appeals for the Third Circuit:

> What is the appropriate period of limitations in Pennsylvania for claims under Sec. 10(b) of the Securities and Exchange Act of 1934 in light of the United States Supreme Court's decision in Wilson v. Garcia, 471 U.S. 261 (1985) and its progeny in the Third Circuit.

The Third Circuit then granted leave to appeal. However, while this appeal was pending, the Third Circuit *en banc* unanimously held in a similar case that the appropriate limita-

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[1] *See* Pennsylvania Securities Act of 1972, 70 Pa. Cons. Stat. Ann. §1-504(a) (Purdon Supp. 1986). Section 504(a) provides that "[n]o action shall be maintained to enforce any liability created under [the Act] one year after the plaintiff receives actual notice or upon the exercise of reasonable diligence should have known of the facts constituting the violation."

[2] *See* 42 Pa. Cons. Stat. Ann. §5524(7) (Purdon Supp. 1987).

tions period for a Rule 10b-5 cause of action was the one year period found in the federal securities law. *In re Data Access Systems Securities Litigation,* 843 F.2d 1537 (3d Cir. 1988).[3] Thereafter, the Third Circuit held that *Data Access* controlled this case and remanded for a determination of the prospectivity of the *Data Access* ruling. *Northrop v. Lease Financing Corporation,* No. 88-1038 (June 24, 1988 3d Cir.)

SUMMARY OF ARGUMENT

The federal interests in uniformity, certainty and preservation of scarce judicial resources require a single statute of limitations for all causes of action under section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder. The single most appropriate limitations period is that found in the federal securities laws.

> Deciding which features of state periods of limitation to adopt for which federal statutes wastes untold hours. (citation omitted). Never has the process been more enervating than in securities law. There are many potentially analogous state statutes, with variations for different kinds of securities offenses and different circumstances that might toll the period of limitations. Both the bar and scholars have found the subject vexing and have pleaded, with a unanimity rare in the law, for help.
>
> . . . As practitioners and scholars agree that the result is a mess, they also believe that the courts missed a turn. Courts should have drawn the periods of limitations for the implied rights from the period of limitations for the express rights. [one year after discovery-three years after the occurrence]. . . . This is what the courts should have used.

Norris v. Wirtz, 818 F.2d 1329, 1332 (7th Cir.) (Easterbrook, J.), *cert. denied,* ___ U.S. ___, 108 S.Ct. 329 (1987). The

[3] On October 3, 1988, this Court denied certiorari in *Data Access,* No. 88-54.

Third Circuit took the correct turn in *Data Access,* by scrupulously following the guideposts established by this Court in *Wilson v. Garcia,* 471 U.S. 261 (1985) and *Agency Holding Corp. v. Malley-Duff & Associates, Inc.,* ___ U.S. ___, 107 S.Ct. 2759 (1987) for borrowing limitations periods.

REASONS FOR DENYING THE PETITION

I. IN DETERMINING THAT THE ONE YEAR-THREE YEAR LIMITATIONS PERIOD IN THE FEDERAL SECURITIES LAW SHOULD GOVERN ALL 10b-5 CLAIMS, THE THIRD CIRCUIT CORRECTLY APPLIED THE BORROWING APPROACH ARTICULATED BY THIS COURT.

A. In *Wilson* and *Agency Holding,* this Court set forth firmly defined and easily applied guidelines for borrowing statutes of limitations.

In *Wilson v. Garcia,* 471 U.S. 261 (1985), this Court acknowledged that "[f]ew areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations" and that there was "conflict, confusion, and uncertainty concerning the appropriate statute of limitations to apply." 471 U.S. at 266.

In order to provide guidance to the lower courts, the Court articulated three questions which must be answered to determine "the most appropriate" or "most analogous" state statute to apply to the plaintiff's claim. 471 U.S. at 268. The first question is whether state law or federal law governs the characterization of the claim for statute of limitations purposes. The second question is whether, if federal law applies, all claims should be characterized in the same way, or whether they should be evaluated differently depending upon the varying factual circumstances and legal theories presented in each individual case. The third inquiry focuses on the essence

of the claim in the pending case, and which state statute provides the most appropriate limiting principle.[4] 471 U.S. at 268.

Thereafter, in *Agency Holding Corp. v. Malley-Duff & Associates,* ___ U.S. ___, 107 S.Ct. 2759 (1987), this Court reiterated the *Wilson* approach to borrowing, but modified the final inquiry. Courts are now to determine whether a federal or a state statute of limitations should be chosen. Thus, in *Agency Holding,* this Court concluded that the practicalities of litigation under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964 ("RICO"), presented compelling reasons for federal preemption of otherwise available state statutes of limitations and held that the limitations period for all RICO actions is the four year period in the Clayton Act. 15 U.S.C. § 15b. *See* 107 S.Ct. at 2765-66.

Accordingly, the principles derived from *Wilson* and *Agency Holding* are that when the federal cause of action will arise primarily in a single state, then the federal interest in uniformity and certainty will require the application of the single most analogous state cause of action that will best serve the policies of the federal statute, *see Wilson,* 471 U.S. at 275, but when the federal cause of action is likely to arise in a multistate context, then the federal interests in uniformity and certainty will require federal preemption and the application of the most analogous federal statute of limitations, assuming that one exists. *See Agency Holding,* 107 S.Ct. at 2766.

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[4] In *Wilson,* this Court also recognized two key propositions. First is the proposition that it is sometimes more appropriate to choose a federal statute of limitations rather than a state statute of limitations, citing *Del Costello v. Teamsters,* 462 U.S. 151 (1983), and second is the proposition that "the cases also establish that the silence of Congress is not to be read as automatically putting an imprimatur on state law," citing Justice White's dissent in *Auto Workers v. Hoosier Cardinal Corp.,* 383 U.S. 696, 709 (1966). 471 U.S. at 268, n. 20.

B. Application of *Wilson* and *Agency Holding* to claims under section 10(b) of the Exchange Act and Rule 10b-5 requires selection of the limitation found in the federal securities laws.

This Court has not had occasion to determine the appropriate statute of limitations to apply in a Section 10(b) cause of action since *Wilson.*[5] The principles of *Wilson* and *Agency Holding,* however, give clear direction.

1. The characterization of a 10b-5 claim is a matter of federal law.

The characterization of a federal claim for purposes of selecting the appropriate statute of limitations is generally a question of federal law. *Agency Holding,* 107 S.Ct. at 2762. Characterization of a Rule 10b-5 cause of action is derived from the elements of the cause of action, and Congress' purpose in providing it. *See Wilson,* 471 U.S. at 268. The comprehensive scheme of statutes and regulations designed to police the securities industry is indicative of a strong federal interest. *Friedlander v. Troutman, Sanders, Lockerman & Ashmore,* 788 F.2d 1500, 1504 (11th Cir. 1986). Indeed, when Congress provided in the Exchange Act for exclusive jurisdiction in the federal courts, it surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action. *Cf. Wilson,* 471 U.S. at 269.

2. Federal interests in uniformity and certainty require selection of a single limitations period.

For many of the same reasons articulated by this Court in *Wilson* and *Agency Holding,* the federal interests in uniformity, certainty and avoidance of wasteful litigation require the selection of a single statute of limitations for all Rule 10b-5 causes of action. *Friedlander,* 788 F.2d at 1505. In *Agency Holding,* this Court, in determining whether a single statute of limitations should apply to all civil RICO claims, embraced the findings of

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[5] This Court has never ruled on the applicable limitations period for a section 10(b) and Rule 10b-5 action. *See Data Access,* 843 F.2d at 1539, *citing Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 210 n.29 (1976).

the American Bar Association Task Force, Report of the Ad Hoc Civil RICO Task Force, which described the borrowing process as "confused, inconsistent, and unpredictable." 107 S.Ct. at 2763.

Similarly, the Third Circuit, concluding that a single limitations period was needed for all 10b-5 claims, referred to the American Bar Association Report on borrowing a limitations period in the securities area. *Data Access,* 843 F.2d at 1544. *See* Committee on Federal Regulation of Securities, *Report of the Task Force on Statute of Limitations for Implied Actions,* 41 Bus. Law. 645, 646 (1986) (hereafter "Securities Task Force"). The Securities Task Force noted that the use of state limitations periods had resulted in myriad inconsistent federal court decisions ranging from one year in Maryland to ten years in Tennessee. Securities Task Force at 646. Not only can limitations periods vary from state to state but when the claim by claim approach is utilized different limitations periods can be applied within the same state and in the same case. Important to the Court's decision in *Wilson* was the conclusion that Congress would not have sanctioned the application of multiple limitations periods to the same claim in a single case.[6] 471 U.S. at 274-275.

3. The limitations period from the federal securities laws is the most appropriate.

In *Del Costello* and *Agency Holding,* this Court held that when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking, the federal limitations period should be chosen. *See Del Costello,* 462 U.S. at 171-72; *Agency Holding,* ___ U.S. at ___, 107 S. Ct. at 2767. *See also Data Access,* 843 F.2d at 1542, 1545, 1548.

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[6] In the context of labor disputes, this Court has rejected adoption of state statutes of limitations where the result would be a different limitations period applying to the union and the company in the same suit. *See Del Costello,* 462 U.S. at 169 n. 19.

The federal policies at stake in 10(b) and rule 10b-5 actions and the practicalities of litigation make the federal rule a significantly more appropriate vehicle for interstitial lawmaking.

a. Federal law is more analogous.

"As the current chaotic state of law demonstrates, no state law is readily applicable to the federal rights sought to be enforced." Securities Task Force at 656. The federal scheme of limitations expressly set forth in the Exchange Act "clearly provides a closer analogy than available state statutes." *cf. Del Costello,* 462 U.S. at 172. There is no indication that Congress even contemplated a private civil remedy for violations of section 10(b) when the Exchange Act was adopted in 1934, *see Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 196 (1976); therefore any assumption that Congress' failure to provide a limitations period for a private cause of action indicated a desire that limitations periods be chosen from state law is implausible. Securities Task Force at 655. *See also, Data Access,* 843 F.2d at 1547.

Further, where Congress expressly provided for civil liability, the question of limitation of the action was the subject of deep and perhaps "exaggerated" congressional interest. S. Schulman, *Statute of Limitations in 10b-5 Actions: Complication Added To Confusion,* 13 Wayne L. Rev. 635, 637 (1967). Sections 11(a), 12(1) and 12(2) of the Securities Act of 1933, 15 U.S.C. §77 *et seq.,* are governed by a period of one year from discovery of the wrong, with a maximum limitation of three years from the time of the wrong. Substantially identical limitation periods govern sections 9(e), 18(a) and 29(b) of the Exchange Act. This temporal consistency exists despite the diversity among these sections as to concepts of liability, which range from strict liability to negligence, to actions requiring proof of intentional wrong. The behavior prohibited by these sections also varies significantly, and actions by both buyers and sellers are included. S. Schulman at 637. *See also Data Access,* 843 F.2d at 1545-49. "In point of fact, the congressional policy on limitations . . . is so clear that every major commentator who has considered the question has

concluded that the one year and three year statute should be adopted for actions under section 10(b) and rule 10b-5." R. Martin, Jr., *Statute of Limitation in 10b-5 Actions: Which State Statute is Applicable?,* 29 Bus. Law 443, 455 n.91 (1974).

In *Agency Holding,* this Court found the similarity of purpose between RICO and the Clayton Act important. 107 S.Ct. at 2764. In the securities area there is an identity of purpose. Unlike the situation in *Agency Holding,* where the Court had to sift through the legislative history to conclude that Congress had not rejected the use of a federal statute of limitations, *see* 107 S.Ct. at 2766, Congress specifically provided statutes of limitations in the securities area. Indeed, Congress was deeply concerned about the limitations question and drafted the provisions with great care. S. Schulman at 637. *See also* Judge Easterbrook's concurrence in *Cange v. Stotler and Co., Inc.,* 826 F.2d 581 (7th Cir. 1987), where citing *Agency Holding* and *Del Costello,* he suggests that resort to a state law limitations period might not be appropriate where Congress has provided limitations periods in the securities and commodities law. Id. at 599 n.2.

b. The practicalities of securities litigation require federal preemption of otherwise available state statutes of limitations.

"In the context of federal securities regulation . . . the use of state law has disserved not only the federal courts but litigants, the bar, and the investment community." Securities Task Force at 656. Critical to this Court's conclusion in *Agency Holding* that the practicalities of RICO litigation required federal preemption of otherwise available state statutes of limitations, *see* 107 S.Ct. at 2765-66, was the interstate basis of many RICO claims. Like RICO cases, securities cases commonly involve interstate transactions, and conceivably the statute of limitations in all the states could govern claims under section 10(b) and Rule 10b-5.

The Third Circuit, as directed by this Court in *Agency Holding,* considered the multistate nature of securities claims and their impact on interstate commerce. The court noted:

> [The provisions of the 1933 and 1934 securities laws] all aim to compensate the same type of injury. All are designed to fill the void in the common law and to create remedies that would be uniform throughout our nation's commercial universe, instead of being subjected to the vagaries of independent and diverse state statutory regulations.
>
> Authorized by the interstate commerce clause and responding to the need for national uniformity (an absolute component of our national economy), the remedies under the Securities Acts are made uniform by federal law in all 50 states. What Justice Story stated with great eloquence, in another era in another context, seems especially appropriate here:
>
> The law respecting [securities] may be truly declared in the language of Cicero, adopted by Lord Mansfield in *Luke v. Lyde,* 2 Burr. 883, 887, to be in great measure, not the law of a single country only, but of the commercial world. Non erit alia lex Romae, alia Athenis; alia nunc, alia posthac; sed et apud omnes gentes, et omni tempore una eademque lex optinebit. *Swift v. Tyson,* 16 Pet. 1, 10 L.Ed. 865, 871 (U.S. 1842). The necessity for uniform federal remedies in security cases would seem to demand recourse to a uniform federal statute of limitations.

Data Access, 843 F.2d at 1548-49.

Professor Loss also has pointed out that because of the multistate nature of securities claims, referral to state law makes for a great amount of utterly wasteful litigation.

> Since there are fifty-two jurisdictions and at least two statutes of limitations to choose from in each jurisdiction (for example, one for action based on fraud, another in the blue sky law, and often a third residual statute) and five or six commonly implied actions under the SEC statutes .... there are at least 500-odd possible answers (52x2x5).

Fundamentals of Securities Regulation (1983) at 1168. *See also Data Access,* 843 F.2d at 1550 *citing* similar language from Loss' *Fundamentals of Securities Regulations.* Federal courts, by applying state statutes of limitations, create needless inconsistency and unpredictability in securities fraud actions. This problem is compounded by applying the federal equitable tolling doctrine. Securities Task Force at 654.

In *Agency Holding,* the Court, citing an ABA Task Force Report on RICO, pointed out the dangers which multiple statutes of limitations present, such as forum shopping and needlessly complex litigation. 107 S.Ct. at 2766. These same dangers are present in securities litigation. The Securities Task Force Report states:

> This uncertainty and lack of uniformity promote forum shopping by plaintiffs and result in wholly unjustified disparities in the rights of parties litigating identical claims in different states.
>
> Neither plaintiffs nor defendants can determine their rights with any certainty. Vast amounts of judicial time and attorney fees are wasted.

Id. at 647. *See also Friedlander,* 788 F.2d at 1504-05; D. Block and N. Barton, *Securities Litigation,* 7 Sec. Reg. L.J. 374, 378 (1980).

The long limitations periods often borrowed from state statutes also frustrate the purposes of the federal securities laws. The legislative history in 1934 makes it pellucid that Congress included statutes of repose because of fear that lingering liabilities would disrupt normal business and facilitate false claims. It was understood that the three-year rule was to be absolute. *Data Access,* 843 F.2d at 1546 *citing Norris,* 818 F.2d at 1332. *See also* Securities Task Force at 655.

As this Court noted in *Del Costello,*

> These objections to the resort to state law might have to be tolerated if state law were the only source reasonably available for borrowing, as it often is. In this case, however, we have available a federal statute of limitations actually designed to accom-

> modate a balance of interests very similar to that at stake here—a statute that is, in fact, an analogy to the present lawsuit more apt than any of the suggested state-law parallels.

462 U.S. at 151.

Congress passed the securities law during a period of national crisis, which was caused in part by the inability of the states to preserve some order and stability in the stock market. *See* T. Hazen, *The Law of Securities Regulation* at 6-7 (1985). The current uncertainty and inconsistency serves no public purpose and it frustrates the purposes of the securities laws. Management of publicly held companies, as well as their auditors and attorneys, are frequently unable to assess the impact of possible litigation under Rule 10b-5. This deprives investors of information adequate for informed evaluation of such companies' potential liabilities. Securities Task Force at 647.

A number of courts have long recognized the logic of adopting the limitations period provided in the federal securities laws, but have refrained from doing so. For example, in *McNeal v. Paine, Webber, Jackson & Curtis, Inc.*, 598 F.2d 888 (5th Cir. 1979), the court noted that it felt compelled to choose the most analogous state statute of limitations despite the illogic of doing so. The court stated:

> By dint of repeated application in every circuit, with the evident approval of the Supreme Court and without legislative reaction by Congress, that basic rule is at this point definitely established. We are therefore compelled to apply it rather than follow the logically appealing course of applying the period of limitations applicable to a similar cause of action expressly provided in the federal securities laws. Although the latter approach would lead to desirable uniformity in securities litigation from state to state and would eliminate the need to engage in difficult and essentially esoteric comparisons of federal and state remedies, reform must await congressional action.

Id. at 892.

Those signals changed in *Del Costello, Wilson* and *Agency Holding.* The Third Circuit rigorously applied the borrowing test formulated by this Court in *Wilson* and *Agency Holding,* and adopted the most appropriate or most analogous borrowing period for 10b-5 causes of action—the limitations period in the federal securities laws. *Data Access,* 843 F.2d at 1542-50.

II. THE THIRD CIRCUIT'S REFUSAL TO RULE ON THE PROSPECTIVITY ISSUE DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR OTHER CIRCUITS.

The Third Circuit's refusal to address the question of application prospectively only of the limitation period selected in *Data Access* does not conflict with relevant precedent. No rule of law or judicial custom requires resolution of the issue of prospectivity by the court of appeals. The scope of appellate review arising from a Section 1292(b) certified question is within the discretion of the court. *See Miller v. Bolger,* 802 F.2d 660, 666-67 (3d Cir. 1986).

While it may be "commonplace for courts formulating a new or different rule of law to rule on its retroactivity at the same time," *Data Access,* 843 F.2d at 1552 (Seitz, J., dissenting), it has not been required. Nor, in the instant case, was it necessary for the Third Circuit to rule explicitly on the issue of prospectivity to answer the question certified. The district court requested direction only as to the most "appropriate period of limitations" for section 10(b) actions.

Moreover, it is well established that a controversy is to be decided on the law as it exists at the time the appellate court considers the case, although the law may differ from the one in force at the time the trial court decided the matter or at the time the events sparking the litigation occurred. *Hill v. Equitable Trust Co.,* 851 F.2d 691, 695 (3d Cir. 1988), *citing Gulf Offshore Co. v. Mobil Oil Corp.,* 453 U.S. 473, 486 n.16 (1981). There is a presumption of retroactive application of current rulings. *Hill,* 851 F.2d at 697. Thus, in declining to rule on the issue of prospectivity and remanding the instant case to the trial

court, the Third Circuit merely left undisturbed the presumption of retroactive application of the rule set forth in *Data Access.*

Even if it would have been expedient for the Third Circuit to rule on the applicability of the federal one year-three year limitations period to the instant case, such guidance has proved to be largely unnecessary. The test for non-retroactive application of a new rule of law is set forth in *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971). *See, e.g., Goodman v. Lukens Steel,* ___ U.S. ___, 107 S.Ct. 2617 (1987); *Saint Francis College v. Al-Khazraji,* ___ U.S. ___, 107 S.Ct. 2022 (1987). Using the *Chevron* criteria, the Third Circuit has held that the federal limitations period determined as most appropriate in *Data Access* should be applied retroactively. *Hill v. Equitable Trust Co.,* 851 F.2d 691 (3d Cir. 1988).

Before and after the *Hill* decision, district courts within the Third Circuit also have ruled almost uniformly that the *Data Access* holding should be applied retroactively. *See Cohen v. McAllister,* 688 F. Supp. 1040 (W.D. Pa. 1988); *Prospect Purchasing Co. v. Weber, Lipshie & Co.,* ___ F. Supp. ___, No. 85-4279 (D.N.J. August 3, 1988); *McCarter v. Mitcham,* ___ F. Supp. ___, No. 87-34 (W.D. Pa. August 31, 1988); *Ginsberg v. Blay-Miezah,* No. 87-7778 (E.D. Pa. September 1, 1988); *Bradford-White Corp. v. Ernst & Whinney,* No. 83-3371 (E.D. Pa. September 12, 1988); *Adelaar v. Lauxmont Farms, Inc.,* ___ F. Supp., ___, No. 87-0062 (M.D. Pa. September 16, 1988). *But see I.T.G. Inc. v. Price Waterhouse,* No. 86-6331 (E.D. Pa. September 7, 1988) (Ditter, J.); *Gruber v. Price Waterhouse,* No. 86-3976 (E.D. Pa. August 26, 1988) (Ditter, J.) (contrary to the Third Circuit's evaluation in *Hill* that there has not been clear precedent for the appropriate section 10(b) statute of limitations, both *ITG* and *Gruber* turn on the district court's determination that the plaintiffs in those cases relied on clear precedent).

As reflected by the cases decided since *Data Access,* the lower courts have exhibited little difficulty in determining the appropriateness of retroactive application of the federal one year-three year limitations period. Moreover, the Third Circuit's decision in *Hill* has provided additional direction in

affirming the retroactivity of the *Data Access* ruling under a *Chevron* analysis. Since no further guidance is necessary, this Court need not expend valuable judicial resources in consideration of the issue.

CONCLUSION

For the reasons stated above, respondents respectfully request that the Court deny the petition for a writ of certiorari to United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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